

***United States Court of Appeals  
for the  
District of Columbia Circuit***



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SUPPLEMENTAL JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,567

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

*Petitioner,*

v.

UNITED STATES OF AMERICA and  
FEDERAL COMMUNICATIONS COMMISSION,

*Respondents.*

No. 18,045

HUBBARD BROADCASTING, INC.,

*Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION,  
AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

*Appellee,  
Intervenor.*

No. 18,046

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

*Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION,

*Appellee,*

United States Court of Appeals  
for the District of Columbia Circuit

HUBBARD BROADCASTING, INC.,

*Intervenor.*

FILED JAN 29 1964

No. 18,078

HUBBARD BROADCASTING, INC.,

*Petitioner,*

Nathan J. Paulson  
CLERK

v.

UNITED STATES OF AMERICA and  
FEDERAL COMMUNICATIONS COMMISSION,

*Respondents,  
Intervenor.*

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

Appeal from and Petition to Review Decision  
of the Federal Communications Commission

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*  
AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., *Intervenor.*

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Appeal from and Petition to Review Decision  
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SUPPLEMENTAL JOINT APPENDIX

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Intervenor. )

STIPULATION

Appellant-Petitioner in Case Numbers 17,567 and 18,046 proffers three issues for these appeals. Issues 1 and 2, which are not agreed to by Respondents or Intervenor are as follows:

1. Whether the actions here challenged, authorizing two unlimited time Class I operations on Class I-A Channel 770 kc, and to that end requiring the heretofore dominant station (WABC) to directionalize, thus curtailing by some 18 million the number of persons presently receiving primary and secondary coverage from the (flagship) station for the ABC radio network, taken by the Commission after it rejected in the Clear Channel Proceeding (because of resultant "substantial dislocations") any comparable dual directionalized Class I set-ups on any of the other 24 Class I-A channels, were arbitrary, unwarranted, illegal, violative of the public interest, and contrary to the decision and mandate of this Court in Case Nos. 15,399 and 15,400 (108 U. S. App. D. C. 83, 87-88).
2. Whether the disparate treatment accorded the ABC radio network and its New York flagship operation (In Docket 6584 and 6741) vis-a-vis that accorded its two major network competitors in Docket 6741, with ABC having indicated its willingness to accept in Docket 6584 a Class I and Class II-A breakdown of 770 kc comparable to that ordered for NBC's and CBS's New York flagship operations on 660 kc and 880 kc in order to end the KOB controversy, was arbitrary, illegal, prejudicial, violative of the public interest, and contrary to this Court's decision and mandate in Case Nos. 15399 and 15400 (108 U. S. App. D. C. 83, 87-88).

Issue #3, which is agreed to by Respondents and Intervenor as an Issue in Case No. 18046 is as follows:

3. Whether the Commission's rejection of proffered data designed to contrast the public interest gains by KOB in the west with the public interest losses by WABC and by the ABC radio network in the east, if WABC were required to directionalize and protect KOB, was erroneous.

Respondents proffer the following issue for Case No. 17,567:

Whether the Commission determined in Docket No. 6741 that the frequency 770 kc should be utilized by two Class I stations at night, and if so, whether the record in that proceeding, together with the Commission's 1958 decision in Docket No. 6584, support the determination.

Appellee and Intervenor proffer the following issue for Case No. 18,046:

Whether the Commission correctly decided in Docket No. 6584 on July 3, 1963 that ABC had not shown that, as a network, it would be prejudiced by the requirement that Station WABC, New York, operate directionally at night.

Appellant-Petitioner in Case Numbers 18,045 and 18,078 proffers three issues. Issue No. 1, which is agreed to by Appellee-Respondents and Intervenor (without prejudice to their positions on the Motions to Dismiss) is as follows:

1. Whether the Commission's action which continued the operating authority of WABC while conditionally denying the application of WABC for renewal of license:
  - (a) deprives Hubbard Broadcasting, Inc. of a full and fair hearing of its New York application, to which it is entitled, under Section 309 of the Communications Act of 1934, as amended, and Sections 5, 7, 8, and 9 (b) of the Administrative Procedures Act; and,



(b) is in contravention of Section 307(d) of the Communications Act of 1934, as amended.

Issues 2 and 3 proffered by Appellant-Petitioner (in Nos. 18,045 and 18,078), which are agreed to by Appellee-Respondents and Intervenor (without prejudice to their positions on the Motions to Dismiss and to their right to object to the questions being presented to this court at this time are as follows:

2. Whether the action of the Commission in affording American Broadcasting-Paramount Theatres, Inc. an opportunity to file an application for modification of facilities on the frequency 770 kc exceeds the Commission's statutory authority.
3. Whether the Commission's ultimate conclusion that American Broadcasting-Paramount Theatres, Inc. should be allowed to file an application for modification of facilities on the frequency 770 kc is arbitrary and capricious and contrary to the Commission's Rules.

The parties agree that the printed Joint Appendix will be filed one week after the Reply Briefs are filed. The parties will co-operate in designation of the Joint Appendix and its cost will be shared by Appellants-Petitioners.

References in the Briefs to material to appear in the Joint Appendix will be made by identifying pages in the Record on Appeal, and the Joint Appendix will contain the Record pages as well as its own pagination.

Of Counsel:

SPEARMAN AND ROBERSON  
1023 Munsey Building  
Washington, D. C. 20004

October 14, 1963

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Counsel for  
Federal Communications Commission

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Counsel for Hubbard Broadcasting, Inc.

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Counsel for American Broadcasting-  
Paramount Theatres, Inc.

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Counsel for United States of America



Before: Wilbur K. Miller, Circuit Judge, in Chambers.

PREHEARING ORDER

The parties in the above-entitled cases having submitted their prehearing stipulation pursuant to Rule 38(k) of the General Rules of this court, and the stipulation having been considered, the stipulation is hereby approved, and it is

ORDERED that the stipulation shall control further proceedings in these cases unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix of the parties herein.

Dated: October 16, 1963

[2]

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington 25, D. C.

B  
FCC 58-350

57216

In the Matter of	)	
Clear Channel Broadcasting in	)	Docket No. 6741
the Standard Broadcast Band.	)	

FURTHER NOTICE OF PROPOSED RULE MAKING

Introduction

1. The essential question before us in this proceeding is whether and in what manner it may be desirable to amend the rules governing the use of the standard broadcast frequencies designated as "clear channels".

2. In its Order of February 20, 1945, by which this proceeding was initiated, the Commission noted that "there are still large areas of the continental United States which have no radio service during the day and no primary radio service at night". Referring to numerous applications for the assignment of additional radio stations to the clear channel frequencies, and to requests for the authorization of higher power on these frequencies, the Commission designated eleven

issues for hearing, with the announced object of determining what, if any, changes should be made in existing clear channel allocations.

3. It was stated that it would be desirable to make these determinations prior to the forthcoming renegotiation of the North American Regional Broadcasting Agreement of 1941. That Agreement, due to expire March 29, 1946, set out the conditions under which the signatory Governments in North America agreed to restrict their respective use of the standard broadcast frequencies, in the interest of minimizing interference among the broadcast services of the several countries. Effective improvement of the domestic service in this country would have to be achieved in the light of limitations agreed to internationally, both with respect to use of the frequencies in question by the United States and by stations in other countries.

4. It was not possible, however, to conclude this proceeding prior to the renegotiation of the NARBA Agreement. The record of this proceeding did, however, provide useful guidance to representatives of the United States Government in the renegotiation of the revised NARBA which was signed in 1950. A separate Agreement between the United States of America and the United Mexican States was signed in January, 1957. While neither the latter Agreement nor the revised NARBA have yet been

[3]

ratified by the United States Government, and have not yet formally entered into effect, they furnish the basis on which the signatory North American Governments in practice allocate the domestic use of the clear channel and other standard broadcast frequencies.

5. Parties to this proceeding have, in a voluminous and complex record, advocated numerous, diverse approaches to the basic problem of achieving more efficient use of the clear channels and of

improving the deficiencies in the radio service available to the public on those channels. The eleven issues originally designated for hearing in this proceeding, while specific in some respects, were collectively so broad as to permit the parties to advocate any mode of revising clear channel allocations ranging all the way from exclusive nighttime use of selected clear channels by a single station operating at powers increased very substantially higher than the present maximum of 50 kw, to the reclassification of selected clear channels as "local channels" on which it would be possible to assign over a hundred and fifty stations operating at maximum powers of 250 watts. Between these extremes a wide variety of proposals were admissible and were submitted.

6. The record reflects two basically divergent views concerning the measures best calculated to improve the efficient use of the clear channel frequencies. Some parties urge that the chief goal should be to improve the capacity of the major clear channel stations (particularly the Class I-A stations) to provide a satisfactory signal to wide areas, and that this should be achieved by permitting those stations substantially increased power and by limiting (and, during the nighttime hours, excluding) co-channel stations. Other parties contend that the most desirable objective would be to increase the numbers of unlimited time stations on the clear channels and to reduce the degree of protection now afforded to the clear channel stations throughout wide service areas.

7. Since the record of this proceeding was closed, numerous changes have occurred in the radio broadcasting industry. It was during the intervening period that television acquired importance as a new, separate nationwide broadcast service. The advent of television has had a marked impact on radio broadcasting. The nature, source, scheduling and methods of financing of radio programs have undergone appreciable change. There has been a discernable shift

[3]

in the degree of reliance, by both stations and audiences, on nationwide radio network programs. Radio listening habits have altered substantially, both in the total daily hours of listening per family, and in the incidence of the peak

[4]

radio listening hours. Progressively larger proportions of radio broadcast revenues have been drawn from regional and local advertisers than formerly, when national advertisers furnished the major portion of such revenues. Spot advertising has risen markedly while sponsorship of national network programs has correspondingly declined.

8. The same period has also witnessed the definitive establishment of the FM radio service. Moreover, during the thirteen years which have elapsed since this proceeding began, the total number of standard broadcast stations increased from 900 to 3300. Large numbers of smaller communities, formerly dependent on radio stations located in other, more or less distant cities, now have local outlets.

9. In these circumstances, although the Commission desires to resolve the issues of this proceeding with the least possible delay, we have concluded that it would be inappropriate, and inconsistent with sound and fair procedure, to attempt to arrive at final conclusions solely on the basis of the out-dated record before us.

10. At the same time, it would cause needless additional delay merely to reopen the record on the same broad issues as were originally designated. The updating and supplementing of some of the data contained in exhibits originally introduced into this record will be useful. We think it desirable, however, in providing an opportunity for this to be done, to indicate those areas in which we believe

it would be useful to concentrate attention at this stage of the proceeding, in the interests of as sound and expeditious resolution of the problem as is possible. We do so herein.

The Basic Allocations Problem

11. Pursuant to long-standing domestic radio allocations rules and international agreements for the North American Region, all United States standard broadcast stations are assigned to the one hundred and seven 10-kc channels designated for this purpose in the frequency range 535-1605 kcs. Over three thousand standard broadcast stations are currently operating on these one hundred and seven channels and their number constantly increases as new assignments are approved.

12. The rules governing the assignment of standard broadcast stations to specific frequencies seek to achieve, as fully as possible, all three of the basic objectives of:

- (a) Providing some service of satisfactory signal strength to all areas in the country;
- (b) Providing as many program choices to as many listeners as possible, and
- (c) Providing service of local origin to as many communities as possible.

[5]

The effective implementation of these three objectives involves, however, inescapable conflict. This conflict arises from the fact that standard broadcast signals extend far beyond the range within which the signal has sufficient field strength to render a usable service. It follows that the maximum area coverage is obtainable by a single station or a restricted number of high power stations on a given channel. Conversely, the assignment of large numbers of local outlets

on any channel can be achieved at the cost of restricting the co-channel station coverage to the small interference-free service area resulting from mutual skywave interference. Thus, on any given channel, allocation techniques designed for the maximum implementation of Objective (a) derogate from the achievement of Objective (c) and vice versa. There are similar conflicts affecting the maximum implementation of Objective (b).

13. Owing to marked differences in the daytime and nighttime propagation of radio signals in the standard broadcast band these conflicts are much more evident during the nighttime hours than during the daytime. Skywave propagation, effective chiefly during the hours between sunset and sunrise (although present to a lesser degree during a pre-sunset build-up and a post sunrise period of waning intensity), transmits signals much farther than the steadier, but shorter-range groundwave signals which are present both day and night. The field intensity of skywave signals is, however, subject to wide fluctuations, from minute to minute, hour to hour, night to night, season to season, and even year to year (depending on the phase of the sunspot cycle). Thus, skywave, or secondary service, is defined in terms of statistical norms or percentages of the time during which the field intensity achieves specified levels. Half the land areas of the United States lie beyond the range of interference - free groundwave signals and are, accordingly dependent on this skywave or secondary standard broadcast service.

14. As in the case of groundwave signals, but to a markedly greater degree, the interference potential of skywave signals extends very much farther than the range of serviceable signals. It follows that the protection of secondary service areas at night requires much more stringent limitations on the assignment of co-channel stations than does the daytime protection of groundwave service.



15. The impossibility of simultaneously implementing all three of the above stated allocation objectives on any individual channel led to the classification of individual channels into separate groups, with different rules for the assignment of stations, depending upon the purpose for which each class of channel was established. The three basic classifications are clear channels, which are the subject of this proceeding; regional channels, on which stations are assigned under conditions permitting service to large metropolitan areas and immediately adjacent areas; and local channels for the assignment of the maximum possible number of stations serving as local outlets for numerous smaller communities.

[6]

16. Skywave or secondary service free from objectionable interference is provided only by Class I stations assigned to the clear channels; and this service is made possible only by rigid restrictions on the number of stations which may be assigned to the clear channels at night, and by limitations on the radiations of the secondary stations assigned to those channels. Twenty-four of the clear channels are reserved for the exclusive use at night of a single Class I-A station. On most of the remaining 23 clear channels more than one (but, in practice, generally not more than two) Class I-B dominant stations are assigned under conditions requiring mutual protection through the use of directional antennas.

17. The assignment of secondary or Class II stations is permitted on all the clear channels, but unlimited time Class II stations are at present assignable only on clear channels occupied by Class I-B stations.

18. The existing restrictions on the assignment and mode of operation of Class II stations were established with a view to insuring the capacity of the clear channel stations to render the wide-area

[6]

service for which they were created, and on which more than half of the land area of the United States is dependent, since it lies beyond the range of the groundwave or primary service provided by any of the existing stations.

19. One of the principal purposes of this proceeding is to determine the conditions under which the assignment and operating conditions of both Class I and Class II clear channel stations can provide the most efficient use of the clear channels. The essential conflict in the proposals for revision of the present rules lies between increasing the capacity of the Class I stations to render the wide area service and increasing the number of stations permitted on the clear channels.

20. Both objectives have merit. But owing to the unalterable facts of radio transmission in the standard broadcast band, the fullest implementation of either can be achieved only at the cost of derogating from the other. Our difficult task is to find the balance best calculated to serve the public interest.

[7]

#### Chronology of this Proceeding

21. By Order dated February 20, 1945 the Commission designated for hearing the following eleven issues:

- (1) What recommendation concerning the matters covered by this order the Commission should make to the Department of State for changes in provisions of the North American Regional Broadcasting Agreement.
- (2) Whether the number of clear channels should be increased or decreased and what frequencies in the standard broadcast band shall be designated as I-A channels and as I-B channels.



- (3) What minimum power and what maximum power should be required or authorized for operation on clear channels.
- (4) Whether and to what extent the authorization of power for clear channel stations in excess of 50,000 watts would unfavorably affect the economic ability of other stations to operate in the public interest.
- (5) Whether the present geographical distribution of clear channel stations and the areas they serve represent an optimum distribution of radio service on whether the fair, efficient, and equitable distribution of radio service among the several states and communities specified in Section 307(b) of the Communications Act requires a geographical redistribution at this time.
- (6) Whether it is economically feasible to relocate clear channel stations so as to serve those areas which do not presently receive service.
- (7) What new rules or regulations, if any, should be promulgated to govern the power or hours of operation of Class II stations operating on clear channels.
- (8) What changes the Commission should order with respect to geographical location, frequency, authorized power or hours of operation of any presently licensed clear channel station.

[8]

- (9) Whether and to what extent the clear channel stations render a program service particularly suited to the needs of listeners in rural areas.

- (10) The extent to which the service areas of clear channel stations overlap and the extent to which this involves a duplication of program service.
- (11) What recommendation, if any, the Commission should make to the Congress for the enactment of additional legislation on the matters covered by this Order.

22. In March and April, 1945, four Government-Industry Committees were established to:

- (1) Determine what constitutes a satisfactory signal.
- (2) Determine what constitutes objectionable interference.
- (3) Determine the distances over which signals of various field intensities are transmitted.
- (4) Coordinate the conduct of listener surveys.

23. Evidentiary hearings were conducted during 40 days between January 14, 1946, and October 31, 1947.

24. On February 5, 1946, the Commission announced the adoption of the policy of dismissing applications for station assignments or modifications of station assignments which were not permissible under the existing rules in that they either sought additional unlimited-time assignments on channels reserved for the exclusive night use of a single Class-I-A station, or sought authorization to transmit in excess of the established 50-kw power limitation.

25. In June, 1946, the Commission announced the adoption of a policy limiting the processing of applications for Class II stations on channels occupied by Class I-A stations to daytime stations located within 750 miles of the dominant Class I-A station. This was intended to avoid new assignments in areas sufficiently removed from the existing Class I-A station that it would be possible to assign new unlimited-time

stations in such areas, in the event it were decided subsequently to do so.

[9]

26. In May, 1947, The Commission initiated a separate proceeding (Docket No. 8333) to determine whether and the extent to which limitations should be imposed on the daytime (i.e., pre-sunset and pre-sunrise) skywave radiations toward Class I-A and I-B clear channel stations. At the same time the Commission announced that it would, pending a decision in that proceeding, withhold action on all applications proposing new or increased daytime-only facilities in the United States clear channels.

27. On January 19, 20, and 21, 1948, oral argument was held on the then consolidated clear channel and daytime skywave proceedings.<sup>1/</sup>

28. In December, 1950, the freeze on the processing of specified types of applications for Class II facilities on the U. S. clear channels was revised and couified as a footnote to Section I.371 of the rules. As further revised (in August and October, 1953, and April, 1956) the current policy on deferral of action on applications for new and increased Class II facilities on the clear channels is found in Section 1.351 of the present rules. In general, it covers applications for new daytime or limited time assignments on the clear channel frequencies and applications proposing unlimited time Class II assignments which would operate differently during the daytime and nighttime hours on the clear channel frequencies.

#### Recent Pleadings

29. On November 16, 1956, the Clear Channel Broadcasting Service filed a petition to reopen the record in the Clear Channel proceeding (Docket No. 6741), to consolidate it with the daytime skywave proceeding (Docket No. 8333) and to afford opportunity for the submission of additional evidence, bringing certain exhibits up to date, either in the form of written comments or through further evidentiary hearings. In a response to the foregoing CCBS petition, the Daytime Broadcasters' Association on December 20, 1956, requested dismissal of the clear channel proceeding,

removal of the freeze on the clear channels and institution of rule making on the Association's earlier petition, as amended and revised on December 8, 1955, requesting that daytime stations be authorized to operate from 5 a.m. or sunrise, whichever is earlier, to 7 p.m. or sunset, whichever is later. DBA requested that, in the alternative, if the Commission should grant the CCBS petition to reopen the clear-channel record, the freeze on new assignments to the clear channels in any event be lifted and rule making be initiated on its proposal for extended hours of operation of daytime stations. In a reply to the foregoing DBA pleading, which was filed December 27, 1956, CCBS opposed DBA's requests. On December 28, 1956, Albuquerque Broadcasting Co., the licensee of Station KOB, filed a petition requesting that irrespective of whether the Commission decided to grant or deny the CCBS petition of November 16, 1956, to reopen the record in the Clear Channel proceeding, the Commission in any case, on the basis of the Clear Channel record, select and designate a channel for a permanent assignment for KOB.

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1/ Docket 8333 had been consolidated with Docket 6741 in December, 1947. The two proceedings were again severed in 1953.

## [10]

30. In its Notice of Proposed Rule Making adopted September 17, 1957, in Docket No. 12274, the Commission granted the foregoing request of DBA that rule making be instituted on the proposal that daytime broadcast stations be authorized longer hours of operation. In the same document DBA's requests for dismissal of the instant clear channel proceeding and immediate removal of the freeze on the processing of specified types of applications for Class II assignments on clear channel frequencies was denied. The reasons for those actions are set out at length in the above referenced Notice of Proposed Rule Making and need not be repeated here.

The above cited petitions of CCBS and Albuquerque Broadcasting Co. are dealt with hereinafter.

### The Record

31. The entire record of the Clear Channel proceeding includes over 6,000 pages of testimony, over 400 exhibits ranging from one to several hundred pages in length, numerous written briefs, and over 500 pages of oral argument.

32. The witnesses include, in addition to the members of the FCC engineering staff who testified and placed exhibits in the record: representatives of the radio networks, the Clear Channel Broadcasting Service, representing the independent (i.e., non-network owned) Class I stations, a number of other standard broadcast stations, the Regional Broadcasters Committee, and numbers of educational associations, educational institutions, and farm organizations.

33. Because this Notice does not embody final decisions, but rather is intended to afford interested parties an opportunity to submit up-to-date data and comments in support of or in opposition to the re-allocation plan set out herein below, little useful purpose would be served at this stage by an exhaustive, detailed discussion of the old record. Some of it, owing to the elapse of ten years and the substantial changes in the interim, has little present value. In this category are the ten-year old listener surveys conducted under Government and private auspices, and the out-of-date information on network program availabilities in various areas. Interim changes in radio listening habits and network affiliations, and the diminishing differences between network and locally originated radio programming have stripped those portions of the record of their usefulness.

34. On the other hand the new engineering standards (introduced in Exhibit 109) for calculating the incidence of groundwave and skywave services of six different grades, (Types A through F), remain

[10]

as they were originally, the most comprehensive and realistic tools yet devised for evaluation of standard broadcast service. Additionally, we know from supplementary information that the maps depicting the numbers of such services available in various parts of the country are still representative of over-all conditions and need only some updating to reflect the additional, chiefly small, groundwave service areas added in the interim by newly assigned stations.

[11]

35. The standards referred to in the preceding paragraph were formulated early in the proceeding by three Government-Industry Committees, and were used in preparing numerous exhibits depicting the extent of available groundwave and skywave services. These standards take into account several factors, such as atmospheric noise, which are not reflected in the rules under which the field intensities of a station's signals are calculated for purposes of making station assignments. The refinements embodied in Types A, B, and C groundwave service and in Types D, E, and F skywave service provide useful bases for assessing the extent of the improvements possible under various proposed clear channel reallocations. It must be borne in mind, however, that the calculation of station coverage and of the numbers of services available depends on the choice of a standard for measuring service and that radio service can be calculated only in terms of statistical norms and probabilities. This is especially true of skywave service which is subject to wide, irregular fluctuations. No single method of calculating service can convey all the facts. The more stringent the standard, the smaller the indicated coverage of individual stations and the fewer the indicated number of services in any particular area. Conversely, depictions of service by a lower standard will show wider station coverage and more services in given areas.



36. Maps depicting available services based on the refined standards introduced in this record, especially in terms of the middle grade of groundwave service (Type B) and the middle grade of skywave service (Type E), have provided useful showings of existing services. For reasons discussed later these showings remain essentially valid today.

## [12]

Tentative Conclusions

37. We have already referred, in the introductory paragraphs of this Notice, to the inadequacies of the present record as a basis for supporting final conclusions, largely because of major changes which have occurred in radio broadcasting since the record was closed 10 years ago. We also pointed out, however, that our effort to conclude this proceeding at the earliest possible date will be facilitated if note is taken, at this stage, of the tentative conclusions indicated by the present record, and if the parties will direct their further comments primarily to those areas of action which appear to offer the best prospects for practicable improvement of the service rendered to the public on clear channel frequencies. In determining which kinds of clear channel reallocations could be pursued most fruitfully at this stage, it is appropriate to note such tentative conclusions as may be drawn from the present record, taking into account generally known facts concerning subsequent changes in the radio broadcasting industry.

White Areas

38. This term refers to areas without groundwave, or primary service. When the present record was compiled, an aggregate of about half of the land area of continental United States, with a population of about 24 million people, had no nighttime primary service. The increment, meanwhile, of nearly 2,000 additional standard broadcast stations, appears to have reduced the nighttime white areas only to a minor extent.

[12]

39. Neither new daytime stations, nor new unlimited time stations whose primary service areas were already receiving groundwave service from other stations, have reduced the nighttime white areas. On the other hand, stations newly assigned to communities previously lacking groundwave service have reduced white areas to the extent of their primary coverage. Generally, however, their coverage is restricted by several factors such as the use of low power, assignment to a high frequency, interference, or combinations of the foregoing. Since the population density within the primary service areas of the foregoing new stations is typically greater than in the remaining white areas beyond their range, it appears probable that in the interim there has been a proportionately greater reduction in white area population, than in the numbers of square miles of white area. According to one estimate the present white area population has been reduced from about 24 million to about 20 million. The geographical extent of the white areas appears, however, to remain close to half the land area of the United States -- approximately what it was when the record of this proceeding was compiled.

#### Available Skywave Service in White Areas

40. Exhibits showing the numbers of available skywave service vary substantially, depending upon whether they are based on the methods and standards for engineering calculations set out in the present rules,

[13]

or whether the basis is taken to be Type D, E, or F -- the three grades of the skywave service defined in Exhibit 109. It is well known that even in areas where there is no skywave service of a given standard, skywave service will be present by another standard. The inherent variability of skywave service is such, moreover, that during some periods skywave service in areas in which the maps indicate lack it, is superior to what is available in parts of the areas which the maps indicate are provided



an acceptable standard of skywave service. In fact, there is no part of the United States which is totally devoid of one or more skywave services. The point we make here is that no method of depicting service can convey the full facts, and that we must be mindful of the fact that a determination of the extent of available service depends on the standards and criteria used in defining service.

#### Improvement of Service in White Areas

41. For the reasons briefly discussed in paragraph 39, there appear to be severe limits on the possibilities for reducing white areas by creating new groundwave coverage from new or expanded standard broadcast stations and it follows that improvement of service throughout most of the existing white areas must be provided, if at all, by new or improved skywave service.

42. It is clear, moreover, that improvements in standard broadcast service to white areas must be sought from existing or newly assigned stations within the present standard broadcast band. To the extent that improvement must come from additional or augmented skywave signals, it must be provided by stations assigned to the present clear channels. For reasons which have already been discussed, there is no possibility for obtaining skywave service from stations assigned to regional and local channels. Nor is there any realistic prospect for increasing the number of clear channels by utilizing frequencies outside the existing standard broadcast band. This is precluded by both domestic and international use of other frequencies which might be technically suitable for this purpose.

#### The Impracticability of "Relocation" of Clear Channel Stations on a Significant Scale.

43. By "relocation" is meant the elimination of the present assignment of the clear channel station and the shifting of its location to some other city. "Relocation" should not be confused with "duplication" which is used hereinafter to describe the authorization of additional station

[13]

assignments on a clear channel. Some parties have urged that Class I-A clear channel stations assigned to places like New York and Chicago, where there is a relative abundance of primary service, be relocated in smaller cities situated nearer to the white areas. These proposals do not, however, take adequate account of the need for high powered stations in the larger metropolitan areas with their relatively high man-made noise levels; and in general, the record fails to provide persuasive evidence that the service gains obtainable by relocating the

[14]

present Class I-A station assignments could justify the dislocations and losses of service provided by Class I-A stations.

#### Higher Power

44. An increase of power from 50kw to 750kw would have the effect of nearly quadrupling the field intensity of the transmitted signal at any reception point. An increase to 500kw would slightly more than triple the field intensity of the transmitted signals. The range of usable skywave signals would be considerably increased. Such increases are subject to considerable variation depending on the frequency employed, latitude and other factors; but the basic order of increase is indicated by the fact that at 500kw the .5 mv/m 50% skywave contour would in many cases be located over 1,000 miles from the transmitter instead of about 700 miles, as in the case of a 50kw transmitter. At 750kw the .5 mv/m skywave contour would in many cases be located over 1,000 miles from the transmitter.

45. The improvement in groundwave or primary service is more variable, depending on the frequency employed, soil conductivity and other factors. The essential range of improvement is indicated by the fact that, while at 50 kw, a station operating on a middling frequency in an area of middling ground conductivity will place a .5 mv/m groundwave signal about 130 miles from the transmitter during most of the daytime hours, the same station at 500kw would place a signal of the same field

intensity 190 miles from the transmitter; and at 750kw, about 205 miles from the transmitter.

46. At night, owing to the fact that the field intensity of both the skywave and groundwave signals would be increased by the same factor, there would be no change in the location of the fading zone where the station's skywave and groundwave approach equivalent field intensity, with resultant interference which limits the range of interference-free groundwave service. As a result the range of usable groundwave service would not be increased at night beyond the present range at 50kw unless changes in antenna characteristics are also made. The field intensity of the groundwave signals would, however, be increased three or four times, as the case may be, within the established primary service area. Moreover, the field intensity of skywave signals would similarly be increased within the present skywave service areas, in addition to the extended range of those skywave service areas.

[15]

Duplication of Unlimited Time Assignments on the Clear Channels.

47. On the clear channels occupied by Class I-B stations the duplication of unlimited time assignments is already possible under the present rules. Typically, two Class I-B co-channel stations are assigned to individual Class I-B channels. These stations are required to directionalize their operation in such fashion as to protect the groundwave and skywave service rendered by the other co-channel I-B station. In addition, unlimited time Class II stations are assignable to Class I-B channels subject to established rules for mutual protection and for protection of the dominant Class I-B stations on the channel. It appears, accordingly, that the status quo should be maintained in the rules governing the assignment of unlimited time stations to Class I-B channels.

48. As already discussed, Class I-A clear channel stations are currently given the exclusive use of their channels during the nighttime hours. It is therefore on the Class I-A channels that the maximum opportunities are available for the assignment of new, co-channel unlimited time stations, depending on a judgment as to the extent to which such action would be desirable in the light of the service gains and service losses involved.

Inefficiency of Present Allocations Rules for Class I-A Channels.

49. There is substantial support, in any event, for a conclusion that the exclusive nighttime use of a channel by a single station limited to 50 kw is less justifiable now than formerly, when clear channels were first allocated in this way. Since that time techniques have been established and highly developed for directional transmission of signals, with a high degree of suppression now possible to protect the service areas of co-channel stations. In addition, heterodyne interference, resulting from uncontrolled deviations from the assigned frequency, has been substantially eliminated. Thus it is now possible, particularly in the case of Class I-A stations located in or near the northeast portion of the country, to assign additional co-channel, unlimited time stations to provide needed service at distant locations, while preserving the capacity of the present station to provide a usable signal over wide primary and secondary service areas. In these circumstances there is serious question whether the most efficient use of the Class I-A clear channels can be achieved under the long-standing rules which, on the one hand, preclude power above 50 kw, and on the other hand bar co-channel unlimited time assignments in distant areas the present station cannot effectively serve, and where a new station could be operated so as to afford reasonable protection to the areas the present station can effectively serve at 50 kw.

Additional Unlimited Time Assignments on the Present Class I-A Clear Channels

50. On this record three modes of adding unlimited time assignments on Class I-A channels were discussed:

[16]

- (a) Retention of the present Class I-A station assignment and the co-channel assignment, elsewhere, of an additional Class I station, each directionalized to protect the other.
- (b) The assignment of a single Class I station in a new city, and reduction of the present station to Class II status, thereby substantially eliminating its skywave service and obliging it to protect the new Class I station.
- (c) Preservation of the present station as a Class I assignment, and the co-channel assignment of unlimited time Class II stations required to protect the present station.

For reasons similar to those discussed in Paragraph 43 we have concluded that it would be undesirable and impractical to implement Alternative (b) above. Alternatives (a) and (c) would permit continued skywave service by existing Class I-A stations, while opening up opportunities for additional unlimited time co-channel assignments. Therefore, Alternatives (a) and (b), in our opinion, merit consideration for at least some of the Class I-A channels, on the basis described hereinafter.

The Higher Power versus Duplication Conflict.

51. Some of the parties treated the techniques of higher power and of duplication of unlimited time assignments on the Class I-A channels as approaches which were so contradictory that they are mutually exclusive. We are unable to reach such a conclusion. First, there is little reason why the implementation of one of these techniques on selected Class I-A clear channels should necessarily exclude implementation of

the other technique on other Class I-A channels. There is, moreover, no inherent reason why, if the circumstances were found to be appropriate, higher power could not be permitted to more than one Class I station on a given channel, provided the transmitters were suitably directionalized to protect each other's service area.

52. A study of the circumstances of each of the individual Class I-A channels disclosed, moreover, that in some cases, maximum net gains could be achieved through duplication, while in other cases, the maximum net service gains could be achieved through the use of higher power.

53. Thus, on a purely engineering basis, the optimum improvement of service is achievable by a judicious combination of higher power and duplication of the Class I-A clear channels. Higher power is best suited for use on channels where it would produce the maximum gains in groundwave and skywave service in areas where these services are now most deficient, and where the use of higher power would not cause excessive

interference to other U.S. or foreign stations. On the other hand, the use of higher power by certain other clear channel stations would constitute wasteful use of limited spectrum space in that the service gains would be achieved principally in areas which are already well served, at the cost of reducing the numbers of additional services which might otherwise be established on the channel.

54. If allocations questions could be decided solely on the basis of engineering calculations of deficiencies of the present clear channel service and of the service gains which might be achieved, we think the present record would support the authorization of higher power for half of the 24 Class I-A stations and duplication of unlimited time assignments on the remaining 12 Class I-A channels. Higher power, so employed, would make it possible to provide a minimum of four



Type E skywave services throughout the United States (except small areas in northwest Washington and southeast Florida, which have ground-wave service). This would substantially improve present skywave services throughout most of the present white areas, extend daytime primary services into some areas now lacking it, and generally improve the signal-to-interference ratio throughout the present primary and secondary service areas of the 12 stations operating at 750 kw. The channels and modes of directional operation most suitable to higher power appear to be the following:

<u>Frequency</u>	<u>Directional Operation</u>	<u>Location</u>
640 kc	(DA-1) major lobe to NNE	Los Angeles, California
650 kc	(DA-N) major lobe to SE	Nashville, Tennessee
700 kc	(DA-1) major lobe to S	Cincinnati, Ohio
750 kc	(DA-N) major lobe to S	Atlanta, Georgia
760 kc	(DA-1) major lobe to W	Detroit, Michigan
820 kc	(DA-N) major lobe to W	Dallas/Ft. Worth, Texas
830 kc	(DA-N) major lobe to W	Minneapolis, Minnesota
840 kc	(DA-N) major lobe to SE	Louisville, Kentucky
870 kc	(DA-1) major lobe to N	New Orleans, Louisiana
1040 kc	(DA-1) major lobe to W	Des Moines, Iowa
1160 kc	Omnidirectional	Salt Lake City, Utah
1200 kc	(DA-N) major lobe to NNW	San Antonio, Texas

55. An analysis of the circumstances affecting the remaining 12 Class I-A clear channel stations indicates that, on balance, it would be preferable to maintain the present 50 kw maximum power and to assign additional unlimited time stations on the lines of the following plan:

- (a) On the following five frequencies, assign a new Class I station in the designated state, and require both the new and existing Class I station to directionalize their operations so as to afford each other mutual protection:

[18]

<u>Frequency</u>	<u>Class I</u>	<u>Class I</u>
	<u>Present Assignment</u>	<u>New Assignment</u>
660 kc	New York	Montana
770 kc	New York	(Undetermined)*
880 kc	New York	Wyoming
1100 kc	Cleveland	Arizona
1180	Rochester	Idaho

\*See paragraphs 71 to 73.

(b) On the following seven frequencies, retain the present maximum 50 kw power and assign unlimited time Class II stations in underserved areas:

<u>Frequency</u>	<u>Class I</u>
	<u>Present Assignment</u>
670 kc	Chicago, Illinois
720 kc	Chicago, Illinois
780 kc	Chicago, Illinois
890 kc	Chicago, Illinois
1020 kc	Pittsburgh, Pennsylvania
1120 kc	St. Louis, Missouri
1210 kc	Philadelphia, Pennsylvania

56. A number of basic factors determined the selection of the 12 channels designated above for duplicated unlimited time co-channel assignments. The Class I-A stations concerned are located chiefly at or close to the northern and eastern boundaries of the country. This circumstance affords the maximum opportunities for the assignment of additional unlimited time co-channel stations in the western part of the country where deficiencies in present service and the corresponding need for improvement are the greatest. In the areas where directionalization would eliminate primary or skywave service now rendered by the Class I-A station, there are generally abundant services of good quality from numerous other stations. Thus, the service gains to the needful areas of the West would not be achieved at the cost of destroying badly needed services in the areas the present stations



would cease to serve owing to directionalization. In those cases where directionalization of the present Class I-A station would be required, it would improve service in the direction of the major lobes of the directional patterns. Higher power on the twelve channels listed above would generally produce appreciably less service gains in needful areas, and would create more severe problems of interference to both domestic and foreign stations than would higher power on the twelve channels listed in paragraph 54.

## [19]

57. Having thus selected twelve channels, listed in paragraph 55, on which additional unlimited time stations could usefully be authorized, the question remains whether the new stations should be assigned as Class I or Class II stations. New skywave services on these channels could be obtained only by assigning new Class I co-channel stations protected by directionalizing the present Class I station. New co-channel Class II stations required to protect the present Class I station could provide a new primary or groundwave service, but no skywave service. While this argues for new Class I assignments on as many as possible of the twelve channels listed in paragraph 55, certain offsetting considerations must be taken into account, such as resultant losses of service which would be caused by directionalizing the existing Class I station.

58. In formulating the proposals outlined for the twelve channels covered in paragraph 55, under which five of the existing Class I-A stations would be required to directionalize, while seven would continue to operate as at present, we have taken into account the following factors:

- (a) Possible gains in skywave and primary service in needful areas in the west.
- (b) Resultant losses of service caused by directionalizing existing Class I-A stations.
- (c) The extent of other services available in areas lost to existing stations through directionalization.

(d) Service gains obtainable through directionalization of the existing stations.

(e) Resultant interferences to existing U.S. co-channel and adjacent channel stations.

(f) Requisite protection to foreign stations.

The varying circumstances of each of the twelve channels listed in paragraph 55 are such that in no case do all of the individual factors set out above point conclusively to Class I or Class II status for the new co-channel stations. Prolonged study of all these channels has, however, led us to the conclusion that, on balance, the reallocations outlined in paragraph 55 and discussed in more detail hereinbelow, represent optimum improvement obtainable through the assignment of additional co-channel and adjacent channel unlimited time stations on the twelve channels selected for duplication at this stage. Parties to this proceeding will have the opportunity to comment in support of or in opposition to the specific reallocations proposed, and to suggest such revisions as may appear desirable.

[20]

59. In the case of the seven channels listed in paragraph 55 (b), the balance of all the relevant considerations points, in our opinion to retention of the present mode of operation of the existing Class I-A stations. They would receive protection by newly assigned co-channel Class II unlimited time stations equivalent to what is now afforded Class I-B clear channel stations. This would insure continued service throughout the wide areas where these stations render a usable signal. Such service as these stations may now render in areas beyond the contours which would be protected under this plan is generally not of good quality. Moreover, the peripheral areas involved generally receive adequate to abundant service from other stations. It seems to us justified to sacrifice this peripheral service, if the new stations can be assigned so as to provide primary service where there is now none.

60. In assigning Class II unlimited time stations to these channels, it will be important to bear in mind that they are being made available for new stations in areas which have no primary service. For this reason we do not propose to make the new Class II assignments in cities or areas now receiving numerous services, but would keep them available for new stations located where they could place a first primary service in white areas.

#### FM Broadcasting

60 (a). At an early stage of the proceeding preliminary evidence was received on a proposal by CBS for complete nationwide network coverage through the combined use of FM and standard broadcast stations. Subsequently, however, under a ruling adopted in October, 1947, evidence relating to FM broadcasting was excluded on the ground that the scope of the present proceeding was confined to standard broadcasting. In reaching the tentative conclusions stated herein on the basis of the record before us, we are not unmindful of the fact that FM radio is making contributions of mounting significance to the nation's aural broadcast service, and we would not wish, by any decisions taken in the instant proceeding, to place any undue obstacles in the way of continued development and evolution of the FM service. We believe none are involved in the action here proposed. It is confined to the Class I-A clear channels which would continue to be needed for wide area service under any foreseeable developments affecting the wider utilization of FM radio.

#### Appropriate Further Steps at this Stage of the Proceeding

61. As discussed earlier, we believe that progress in reaching final decision in this proceeding can best be facilitated by inviting interested parties to direct their further comments to those types of clear channel reallocations which appear to offer most realistic opportunities for improving the standard broadcast service. For the reasons discussed in paragraphs 51 to 60, it appears that the optimum improvement which it would be practicable to achieve on the basis of technical

considerations alone would be to implement a plan which would utilize both higher power and duplication, in accordance with the varying circumstances of the individual Class I-A channels.

## [21]

62. In our opinion, however, many of the arguments formerly used in support of the authorization of higher power for clear channel stations need to be reconsidered in the light of the vast changes which have taken place in the standard broadcast industry since the present record was compiled. We are certain that there has been little change in the showings made on the present record, based on engineering calculations, of the available services and of the service improvements which could be effected through the use of higher power. We believe, however, that the drastic changes which have occurred in the broadcasting industry may have a very substantial bearing on other, non-technical considerations affecting the use of higher power for Class I-A clear channel stations.

63. Although the question of higher power needs careful reconsideration in the light of present day conditions, we believe that it would needlessly retard progress toward the improvement of service on the clear channels if we attempted at this stage to give our attention simultaneously to the problems associated with both higher power and duplication. The record of this proceeding has already grown so unwieldy that repeated attempts on the part of the Commission to reach decisions encompassing the whole scope of the original eleven issues have failed until now to produce decisions which a majority of the Commission were prepared to support. We think it desirable, without losing sight of the inherent inter-relationships between the problems of higher power and duplication, to concentrate our attention on them one at a time, and to deal first with the possibilities for achieving service gains through the implementation of a scheme of duplication of unlimited time assignments on Class I-A channels on the lines of the plan briefly summarized in paragraph 55, and more fully described in paragraphs 68 to 77.

64. In deferring at this time active consideration of the problems involved in the authorization of higher power on the remaining twelve Class I-A frequencies, we do not foreclose on opportunity for a thorough examination of that subject later. We are unable to find sufficient justification, in any event, for authorizing higher power on the 12 frequencies on which we propose to consider additional unlimited time assignments. Preservation, in the interim, of the status quo, on the 12 frequencies listed in paragraph 54, would therefore leave unimpaired such opportunities as may exist for the fruitful use of higher power for Class I-A stations.

65. For these reasons, the further proceedings instituted herein will be confined at this stage to an examination of the problems, advantages, and disadvantages of the assignment of additional unlimited time stations on the 12 frequencies already referred to. Before proceeding to a detailed statement of the plan on which comments will be invited, it is appropriate at this point to indicate our views concerning the eleven issues originally designated in this proceeding, taking into account the tentative conclusions already discussed.

[22]

The Original Eleven Issues of This Proceeding

66. For the reasons discussed so far in this Notice and the further proceedings initiated herein, we have reached the following conclusions concerning the eleven issues originally designated in this proceeding.

Issue Number 1:

"(1) What recommendation concerning the matters covered by this order the Commission should make to the Department of State for changes in provisions of the North American Broadcasting Agreement.

This issue can be treated as moot. The specific occasion for it -- renegotiation of the North American Regional Broadcasting Agreement of 1941 -- has long since passed. Moreover, the reallocations proposed herein are consistent with the still unratified North American Regional Broadcasting Agreement of 1950.

Issue Number 2:

"(2) Whether the number of clear channels should be increased or decreased and what frequencies in the standard broadcast band shall be designated as I-A channels and as I-B channels.

There is no practicable basis for increasing the number of clear channels. We conclude that it would not be in the public interest to decrease the number of clear channels, since much needed improvements in wide area service to regions lacking in groundwave service can be achieved only by clear channel stations adequately protected against interference. We conclude that this need requires that all the frequencies now classified as clear channels remain so classified. Moreover, we propose retention of the present designations of the Class I-A and Class I-B channels. We do look toward the removal of nighttime exclusivity on 12 designated Class I-A channels, and the assignment of an additional Class I station on five of these 12 channels. However, while in certain respects the new assignment rules for these channels would be similar to those governing station assignments on Class I-B channels, we do not propose their reclassification as I-B channels. The Class I-A designation would be retained, consistently with their classification under NARBA as U.S. Class I-A channels entitled to the higher degree of protection foreign countries have agreed to provide on the Class I-A channels, as compared with the lesser protection required on the Class I-B channels. (While the precise formulation of revised rules need not be decided at this stage, it may be desirable, while retaining Class I-A classification for these channels, to create subordinate classifications depending on whether new co-channel unlimited time assignments would be confined to Class II stations, or would include an additional Class I station, with mutual protection by both the new and existing Class I station).



Issue Number 3:

"(3) What minimum power and what maximum power should be required or authorized for operation on clear channels.

For the reasons already discussed, we believe a maximum power of 50 kw should be retained for the Class I stations on the following clear channels:

660 kc	780 kc	1100 kc
670 kc	830 kc	1120 kc
720 kc	890 kc	1180 kc
770 kc	1020 kc	1210 kc

Consideration of the possible advantages and disadvantages of authorizing higher power on the following frequencies is being deferred at this time.

640 kc	760 kc	870 kc
650 kc	820 kc	1040 kc
700 kc	830 kc	1160 kc
750 kc	840 kc	1200 kc

Issue Number 4:

"(4) Whether and to what extent the authorization of power for clear channel stations in excess of 50,000 watts would unfavorably affect the economic ability of other stations to operate in the public interest.

The outdated record of this proceeding affords an inadequate basis for sound judgments on this issue under the changed conditions in the radio broadcasting industry. Further consideration will be deferred to such time as the Commission may decide to institute further rule making on the authorization of higher power on some of the Class I-A clear channels.

Issue Number 5:

"(5) Whether the present geographical distribution of clear channel stations and the areas they serve represent an optimum distribution of radio service or whether the fair, efficient, and equitable



distribution of radio service among the several states and communities specified in Section 307(b) of the Communications Act requires a geographical redistribution at this time.

The present record indicates the desirability of examining such geographical redistribution of such clear channel assignments as may be achieved in the plan on which further rule making is initiated herein.

[24]

Issue Number 6:

"(6) Whether it is economically feasible to relocate clear channel stations so as to serve those areas which do not presently receive service.

The record fails to support the desirability of outright relocation of clear channel stations in the sense of shifting the present Class I assignment from the present city to a new city and eliminating the present assignment appears neither desirable nor feasible. On the other hand, redistribution of Class I clear channel assignments to the extent envisaged in the rule making proposal initiated herein does appear to merit consideration.

Issue Number 7:

"(7) What new rules or regulations, if any, should be promulgated to govern the power or hours of operation of Class II stations operating on clear channels.

Proposals for amendments to the rules covering the powers and hours of operation of Class II daytime stations are before us in separate rule making proceedings on the daytime skywave problem (Docket No. 8333) and the problem of extended hours for daytime broadcasters (Docket No. 12274). Decisions will be reached in those proceedings with due regard for the major policy decisions reached in the instant clear channel proceeding.

Issue Number 8:

"(8) What changes the Commission should order with respect to geographical location, frequency, authorized power or hours of operation of any presently licensed clear channel station.

Final decisions concerning modification of outstanding licenses will be deferred pending the conclusion of rule making on the allocations issues.

Issue Number 9:

"(9) Whether and to what extent the clear channel stations render a program service particularly suited to the needs of listeners in rural areas.

The Listener Surveys whose results are spread on the record of this proceeding are too outdated to provide a sound basis for judgment on this record.

Issue Number 10:

"(10) The extent to which the service areas of clear channel stations overlap and the extent to which this involves a duplication of program service.

[25]

The information on the record concerning duplication of program service is too outdated to provide a sound basis for judgment at this time.

Issue Number 11:

"(11) What recommendation, if any, the Commission should make to the Congress for the enactment of additional legislation on the matters covered by this Order."

The Commission possesses the requisite statutory power to implement the reallocations proposed herein and enactment of additional legislation is, accordingly, not required.

Rule Making Proposal

68. We have summarized in paragraph 55 a plan for the assignment of additional unlimited time stations on 12 of the clear channels. On five of these -- 660 kc, 770 kc, 880 kc, 1100 kc and 1180 kc, that plan contemplates the assignment, in specified western states, of a

new Class I station and the mutual protection of both the new and the existing Class I station by directionalization. On seven other Class I-A frequencies -- 670 kc, 720 kc, 780 kc, 890 kc, 1020 kc, 1120 kc, and 1210 kc -- it is proposed to permit the present Class I-A station to continue to operate as at present, and to assign to those frequencies additional unlimited time Class II stations which would be required to protect the present Class I-A station in a manner comparable to the requirements for protecting Class I-B stations under the present rules. On all 12 of the foregoing frequencies the present Class I station would continue to operate at 50 kw maximum power. The new Class I stations in the first group would also be permitted to operate at power of 50 kw. The daytime and nighttime powers of the Class II stations assigned to the remaining seven of these frequencies would be determined as at present for Class II stations.

69. Several reasons underlie the designation of specific states for the assignment of a new Class I station. The first reason is procedural. It is desirable to simplify, so far as possible, the procedural steps necessary to implement the plan, and to minimize the time necessary to accomplish this. The record of this proceeding -- and in particular the depictions of existing skywave services in white areas clearly supports the desirability of assigning new Class I stations in the states designated in paragraph 55. Thus, there is no need for the excessively complicated comparative hearings which would be necessary if the channel were opened up for mutually exclusive applications throughout the entire wide area in which Class I co-channel assignments might otherwise be possible.

70. The individual states designated for the assignment of new Class I stations have been tentatively chosen, with the general directional antenna characteristics that are required in mind, principally upon the basis of the optimum location for improvement of secondary service in western areas where it has to be relied on most. Additionally, the choice of locations is supported by the record as in compliance with the requirements of Section 307 (b) of the Act for fair, efficient and equitable distribution of radio service among the several states and communities.

[26]

71. It should be noted that in the case of one channel - 770 kc - we have not designated the state in which the new Class I station would be assigned. This frequency, on which a Class I-A station is presently assigned to New York City, is involved in a separate, adjudicatory proceeding (Docket Nos. 6584 and 6585), in which there is at issue the question of whether Station KOB at Albuquerque, New Mexico, should be licensed to operate as an unlimited time station on 770 kc or on 1030 kc (on which at present a Class I-B station is assigned to operate at Boston, Massachusetts). Under Section 3.25(b) of the present rules, the assignment of a co-channel unlimited time station is permissible on 1030 kc. Thus, a decision in the above-referenced adjudicatory proceeding to assign KOB to that channel would not require reclassification of 1030 kc. Section 3.25(a) of the Rules, on the other hand, does not at present contemplate the unlimited time operation of another station on 770 kc. Accordingly, the question of whether the allocations rules governing the use of 770 kc should be amended to permit the assignment of a co-channel unlimited time station at Albuquerque is also at issue in the KOB proceeding.<sup>2/</sup>

72. The Commission cannot properly anticipate in the instant proceeding the decision it will reach in the KOB adjudicatory proceeding. We note, however, for the purposes of the instant rule making proceeding, that the assignment of KOB to either 770 kc or 1030 kc would be fully consistent with the general scheme of reallocations proposed herein. As stated above, the use of 1030 kc, which is a Class I-B channel, is permitted under the present rules. Alternatively, the use of 770 kc for an unlimited time station at Albuquerque would help to implement the objectives of the scheme of reallocations proposed herein in a manner consistent with the action contemplated for the other Class I-A channels, particularly those similarly situated in the northeastern portions of the United States.

73. In these circumstances, taking into account the special problems growing out of the history of the KOB proceeding, we go no further

in the instant proceeding at this stage, than to note the desirability of assigning a new Class I station on 770 kc in a western state where the need is greatest for such a new assignment, and where it would be sufficiently removed from New York to minimize loss of service from directionalizing the present New York station. We leave for determination in the KOB adjudicatory proceeding the question whether KOB should be licensed to operate unlimited time at Albuquerque on 770 kc or on 1030 kc, and under what conditions. Should it be decided in the KOB proceeding that it would be preferable to license KOB for unlimited time operation on 1030 kc, it would then be appropriate, and consistent with the reallocations proposed herein, to make 770 kc available for assignment in some other western city, and we herein propose to do so in that eventuality. Conversely, if 770 kc were selected for Albuquerque, 1030 kc remains available under the existing rules for a similar Class I assignment elsewhere.

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<sup>2/</sup> KOB is presently operating unlimited time on 770 kc under special authority.

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74. The assignment of Class II unlimited time stations to 660 kc, 770 kc, 880 kc, 1100 kc, and 1180 kc would necessarily have to be deferred until a determination has been made of the precise location and specific operating conditions of both the new and existing Class I stations on each of these channels. Until this is done it would not be possible to determine precisely what Class II stations and what mode of operation would ensure the requisite protection to the dominant Class I stations on these channels. This proposal contemplates, however, that when the precise location of the new Class I stations and specific operating conditions of both the new and existing Class I stations are determined, applications would at that stage be accepted for Class II unlimited time stations on these five channels.

75. With respect to the assignment of Class II stations to 670 kc, 720 kc, 780 kc, 890 kc, 1020 kc, 1120 kc, and 1210 kc, we find that directionalization of the eastern station to the extent necessary to establish a useful skywave service in the west would be at the sacrifice of primary coverage in eastern areas where there is a definite deficiency of primary service. We thus find it appropriate to require protection of the extended primary coverage now given by the existing stations involved. It follows that the western usage must be confined to Class II assignment, i.e., stations providing protection to the eastern Class I station, and at the same time subjected to interference from the Class I stations to the extent of eliminating skywave coverage. Such duplicate operation is consistent with our objective only if it results in the addition of primary service to areas where such service is deficient or lacking entirely. Accordingly it is our purpose to elicit specific proposals concerning possible station assignments which would supply primary service to areas not now receiving such service. If there are indications of potential station assignments of this nature, Commission rules would be appropriately amended to make these channels available for that express purpose. If, in this proceeding or under the anticipated rule change applications consistent with these tenets are not forthcoming, the channels in question would be the subject of further consideration.

76. The processing of applications for new and expanded daytime facilities on the twelve Class I-A channels in question should be deferred until reasonable opportunity has been provided for the assignment of unlimited time Class II stations on these channels. It is not possible at this time to anticipate with exactitude the date when it will be appropriate to permit the assignment of new daytime Class II stations on these channels. Such action would, accordingly, be deferred until a later stage when the pattern of new Class II unlimited time assignments on these channels has become sufficiently crystallized to insure that the assignments of new daytime stations would



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not unreasonably block opportunities for the assignment of Class II unlimited time stations meeting the above-stated requirements.

77. Owing to the fact that we have decided to maintain the status quo on the twelve other Class I-A frequencies on which the possible consideration of higher power is being reserved until later, i.e., 640 kc, 650 kc, 700 kc, 750 kc, 760 kc, 820 kc, 830 kc, 840 kc 870 kc, 1040 kc, 1160 kc, and 1200 kc, it will not be appropriate pending such action, to clutter those frequencies with daytime assignments which would tend to prejudice such considerations as it may later be desirable to give to proposals for increased power.

78. Any interested party who is of the opinion that the proposals set out in Paragraphs 55 and 68 to 77 of this Notice should not be adopted, or should not be adopted in the form set forth herein, may file with the Commission on or before July 15, 1958, a written statement or brief setting forth his comments, together with supporting data. Comments and data in support of the proposed amendment may also be filed on or before the same date. Comments or briefs in reply to the original comments may be filed within 45 days from the last day for filing said original comments. No additional comments may be filed unless (1) specifically requested by the Commission or (2) good cause for the filing of such additional comments is established.

[29]

79. In accordance with the provisions of Section 1.54 of the Commission's Rules and Regulations, an original and 14 copies of all statements, briefs or comments shall be furnished the Commission.

80. Authority for the adoption of amendments to the rules embodying the proposals set out herein is contained in Sections 4 (i), 301, 303 (a), (b), (c), (d), (f) and (r) and 316 (a) of the Communications Act of 1934, as amended.

Disposition of Recent Pleadings

81. Pursuant to the foregoing, IT IS ORDERED, That the petition filed by the Clear Channel Broadcasting Service on November 16, 1956, IS GRANTED to the extent consistent with the further rule making initiated herein and IS DENIED in all other respects. IT IS ORDERED FURTHER, That the petition filed in this proceeding by Albuquerque Broadcasting Company on December 28, 1956, referred to in paragraph 29, IS DENIED.

82. One other group of recent pleadings not previously referred to herein requires disposition. On December 19, 1957, Everett L. Dillard, Trading as Commercial Radio Equipment Co., licensee of WDON, a Class II daytime station operating on Class I-B Channel 1540 kc with a power of 250 watts, filed a petition (bearing Docket Nos. 6741 and 8333) requesting that the Commission institute proceedings to amend the rules so as to delete 1540 kc from Section 3.25 of the rules, thereby terminating the present classification of this frequency as a Class I-B channel. The petition also requested that Station KXEL, now assigned to Waterloo, Iowa as a Class I-B station on 1540 kc, be reclassified as a Class II station, pursuant to Section 3.182 (4) (b) of the rules concerning automatic reclassification of standard broadcast stations. (A grant of the above-requested amendment to Section 3.25 would invoke the same reclassification of KXEL to Class II stations, although on other grounds). The petition requested finally, that these actions be considered separately from the instant Clear Channel proceeding and the Daytime Skywave proceeding (Docket No. 8333). Comments supporting this petition were filed on April 3 and April 8, 1958, respectively, by La Porte Broadcasting Co., Inc., licensee of WLOI, a Class II daytime station operating on 1540 kc assigned to La Porte, Indiana, and Dalworth Broadcasting Company, Inc., licensee of KCUL, a Class II unlimited time station assigned to Fort Worth, Texas.

83. For reasons discussed in paragraph 47 hereof, we found, on the basis of this record, that it would be undesirable to make any general reallocation of the Class I-B channels. The WDON petition raises questions arising out of special circumstances affecting 1540 kc in particular. For this reason, it is appropriate to deal with that petition separately, and not within the context of this proceeding, which is concerned with broader aspects of clear channel reallocation. We do not, therefore, rule on the foregoing petition herein, but will consider and decide it separately, with due regard for the broad policy decisions reached in the instant proceeding.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Mary Jane Morris  
Secretary

Adopted: April 15, 1958

Released: April 15, 1958

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THIRD NOTICE OF FURTHER PROPOSED RULE MAKING

1. Notice is hereby given of further proposed rule making in the above-entitled matter. For purposes of identification the proceedings to be conducted pursuant to this Notice shall be designated as Part III. The proceedings heretofore conducted pursuant to the Further Notice of Proposed Rule Making (FCC 58-350) issued by the Commission on April 15, 1958, have been designated as Part II. The proceedings heretofore conducted pursuant to the Order issued by the Commission on February 20, 1945, by which this proceeding was initiated have been designated as Part I.

The Proceeding: Basic Questions to be Resolved

2. The basic question to be resolved in the proceeding is what changes, if any, should be made in the use of the clear channels of the standard broadcast band which are available by international agreement for use of the United States. The Class I stations which operate on these channels are designated to render skywave (long range) service, as well as groundwave (short range) service. This permits them to render wide-area service and thus reach extensive land areas in the United States beyond the effective range of any other classes of radio stations. The United States has Class I-A priority for 25 stations on 25 of the 39 channels on which I-A priorities are recognized, and Class I-B priority for 34 stations on 20 of the 24 channels on which I-B priorities are recognized. <sup>1/</sup>

3. Under the present rules, Class I-A channels with two exceptions are not shared at night by the Class I-A stations with any other stations within the continental United States. The Class I-B channels are so allocated that the Class I-B stations share the same channel with one or more other United States stations and with foreign stations. Thus, listeners are afforded a relatively high degree of protection from interference in reception of Class I-A stations and a lesser, though substantial, degree of protection from interference in receiving Class

I-B stations.

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<sup>1/</sup> The apparent summation of 63 channels (30 plus 24) on which I-A or I-B priorities are recognized follows from the fact that on three channels (640, 1010, and 1540 kc) both I-A and I-B priorities are recognized in different countries. The International Agreements designate 60 clear channels on which I-A and I-B priorities are delineated.

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The skywave (long range) service furnished by clear channel stations is the only nighttime standard broadcast service now available to approximately 25,631,000 persons in an area in the aggregate of about 1,725,000 square miles, which comprises somewhat more than half the land area of the continental United States, with the exception of Alaska and Hawaii.

4. The fundamental conflict in the proposals for revision of the present Rules on clear channel usage lies between sustaining or increasing the capacity of the Class I stations to render wide-area service and increasing the number of stations permitted on these channels.<sup>2/</sup>

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<sup>2/</sup> The Committee on Broadcasting of the Institute of Radio Engineers published, prior to the adoption of present rules, a report on "The Clear Channel in American Broadcasting" in which the following conclusions were reached with respect to shared and clear channels. See, e.g., 21 Proceedings of the Institute of Radio Engineers 5 (1933).

"1. The field of the shared channel is to afford broadcast service to important detached centers of population, such as our cities and large towns.

"2. The field of the clear channel is to afford service to those vast intervening areas in which the density of population is so low that a broadcast service could not otherwise be supported and in addition to a single large center."

The consequences of increasing the number of shared channels at the expense of cleared channels are summarized in the report as follows:

"1. Decreasing the number of clear channels by assigning additional stations (for nighttime operation) to channels now used by only one station at a time would have the effect of affording additional services to certain localized urban groups but at the expense of de-

creasing the service to rural listeners and to those at remote points.

"2. Increasing the number of clear channels at the expense of the shared channels would have the opposite effect, assuming that assignments for the stations thus displaced could not be provided for on the remaining shared channels."

The principles thus stated in 1933 remain applicable today.

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The April 15, 1958 Notice

5. The April 15 Notice (FCC 58-350) invited comments on proposals to open 12 specified Class I-A channels for additional unlimited time assignments, to reserve for later determination proposals to increase power on the remaining Class I-A channels, and to leave unchanged the Class I-B channels listed in Section 3.25(b) of the Rules.

6. On five of the 12 channels proposed for additional unlimited time assignments it was proposed to assign a new directionalized Class I station and require the existing Class I station to directionalize, with corollary reduction in service, with the result that each station would afford mutual protection from interference to the areas served by the other. On the other 7 channels it was proposed to assign unlimited time Class II stations in underserved areas.

Tentative Conclusions on the April 15, 1958 Notice

7. Comments in response to the April 15, 1958 Notice were filed by some 60 parties and reply comments were filed by about 44 parties. On the basis of the comments which have been filed it is shown that, although permitting the licensing of additional stations, the proposals would result in substantial reduction of the existing ground wave and skywave service, with the result that substantial new "white areas" would be created in which no ground wave service would remain available from any station and that other areas would be reduced in the number of services received from four, three or two ground wave services to a single ground wave service. In addition, substantial dislocations would obtain of present skywave service which would not be fully compensated by new operating. Also, we note that, a substantial number



of assignment counterproposals have been made which fail to accomplish any substantial increase in groundwave service to white areas. Accordingly, it appears desirable in light of the comments to secure additional data in response to a further notice before proceeding toward a conclusion of the proceeding.

8. Although the Commission in its April 15, 1958 Notice did not invite comments on the question of increased power for Class I stations, some parties addressed themselves to it.<sup>1a/</sup> We do not discount the fact that historically the present power limit of 50 kilowatts was determined in substantial measure upon early radio equipment, whereas more powerful transmitting apparatus has not become readily available, the use of which in the United States could substantially increase the signal strength of the present nighttime skywave service on the clear channels and thus generally improve the signal-to-interference ratio thereof. We observe, however, as the record clearly shows, that the scope of the skywave service depends upon many variables including

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<sup>1a/</sup> Other parties indicated their desire to file comments on higher power at such time as the Commission invited updated comments on this mode of clear channel reallocation.

the type of transmitting antenna and the varying atmospheric noise levels as well as the broadcast station power. The record shows that the most satisfactory present skywave service does not necessarily coincide with the strongest signal areas but is instead realized in those geographic areas, with relation to the stations, where the absence of interference, of signal fading, and of atmospheric noise permits the use of optimum receiver sensitivity for adequate reception. The Commission's Exhibit 109, herein, which is based on the results of three Industry-Government Committees, includes criteria for three grades of skywave service, grading off in quality with respect to freedom from noise and interference.<sup>3/</sup> These are all based upon the percentage of

nights that radio service is realized throughout the entire year and are thus weighed down statistically by the perturbation of summertime static, the atmospheric noise resulting from the thunderstorms prevalent during the summer months. Thunderstorm activity is virtually absent during the winter months according to data on the seasonal distribution of atmospheric noise<sup>4/</sup> which shows reduction of approximately 19 decibels (nearly 100 times) during winter months as compared to summer. It follows that in many areas reception is now generally noise-free and satisfactory during winter although quite unsatisfactory during the summer--thus depressing the grade of service on an annual norm basis--and that an approximately hundredfold increase in power to five megawatts would be necessary during summer months to secure noise-free service equivalent to that now available the existing power during the winter months. However, nighttime conditions extend for several hours more each day during winter at most latitudes in the United States, then during summer. Thus nighttime skywave signals are of maximum quality at the time when maximum daily use thereof can be made. Conversely, during the long summer days, the daytime groundwave service

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<sup>3/</sup> Skywave service of a clear channel station, under Exhibit 109, is considered to be limited by the noise from electrical apparatus to the 250 microvolt per meter contour in rural areas, (Para. B 3(c) (5)) and to 0.5 millivolt per meter contour in urban areas (Para. F. of Exhibit 109).

<sup>4/</sup> Noise is highest in summer and lowest in winter at temperate latitudes; varies with frequency, decreasing with increasing frequency; and varies with geographic location, highest levels being encountered in equatorial regions and the lowest levels in the polar regions. World-wide Radio Noise Levels Expected in the Frequency Band 10 Kilacycles to 100 Megacycles; National Bureau of Standards, NBS Circular 557, August 1955.

is, on balance, of increasing significance. Already, basically free of

station interference, groundwave service during these hours has been further augmented by the assignment of daytime stations in various parts of the country for operation during the hours between local sunrise and sunset, and the assignment of increased facilities to unlimited time regional and local stations during these hours. As a cumulative result, multiple groundwave services are available during daytime hours in most areas and there is almost no area to be found within the entire United States, excepting possibly Alaska and Hawaii, wherein there is an absence of all service meeting the groundwave service standards formulated during the course of the proceedings herein.

9. Those considerations in our view offset to an extent the arguments offered in support of authorizing higher power for Class I stations. However, before reaching final decision on higher power, we deem it appropriate to afford an opportunity for all interested parties to submit such additional comments and data as will reflect changed conditions since 1946 when the basic record on this aspect of the proceeding was made.

10. During nighttime hours more than half the land area of the United States receives no groundwave service from any stations. Termed "white area", such is comprised principally of the rural and smaller urban communities throughout the U. S. As of May 1947, the total amount of "white area" was 1,802,665 square miles which amounted to 60.59% of the total land area. Based on the 1940 Census a population of 23,252,000 lived in white areas. Between May 1947 and January 1957, fulltime stations increased from 1,339 to 1,875. The decrease in white area, however, has not been significant. The January 1957 white area totals 1,725,095 square miles which represents 57.99% of the total land area. The population residing therein has increased to 25,631,259. With reference to geographic distribution, while the bulk of such area (74.8%) is located west of the Mississippi River the bulk of the 1957 population residing therein (18,277,835 or 71.3%) lives east of the Mississippi River. None of the figures include Alaska or Hawaii. A map of the population distribution according to the 1950 Census is attached as Appendix A.

11. Principal areas with no groundwave service during nighttime hours are located in northern New England, in the more mountainous regions of the Middle Atlantic States, throughout the South, in the northern-most part of the Great Lakes Area, within the great plains, and in many mountainous areas of the West. A map of nighttime groundwave service is attached as Appendix B.

12. The April 15, 1958 Notice stated that there are severe limits on the possibilities for reducing white areas by creating new groundwave coverage from new or expanded standard broadcast stations. This limitation is essentially basic due to the necessary limitation on the number of channels available for standard broadcasting and the disruptive interference which occurs in such great areas when two or more stations transmit during nighttime hours on the same frequency at the same time. Satisfactory reception in the presence of interference is limited to those areas sufficiently close to a transmitting antenna to receive a signal strong enough to buffet out the

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ambient interference on the channel. It has been ascertained that the service area to interference area ratio (area efficiency) of the generally shared (regional) channels is less than one percent, despite the use of directional antennas to minimize interference among stations. Thus we conclude that we should limit our consideration, with respect to a sharing of the clear channels, to the assignment of new stations in specifically delineated geographical areas which could be determined upon the basis of need for the new or additional service and availability of an assignment to that area with minimum impact on the existing service under the service and interference criteria of Part I hereof.

#### The Further Proceeding

13. In this part (Part III) of the proceeding the Commission will give consideration to two matters. First is amendment of the Rules so as to provide for the assignment of new Class II station on each of the frequencies listed in Table I attached hereto. Each new Class II station

on these frequencies would be licensed within a prescribed geographical area; viz., within a specified state or within one of two or more jointly specified states as set forth completely in Table I attached and also shown on the map attached hereto as Figure I. The Class I stations now licensed to operate exclusively in the United States on these channels, listed in Table I, would continue to operate with 50 kilowatts of power but would share operation on the channel with one newly licensed station located in the designated area. Each new station licensed under the amended rule would be required to install a directional antenna<sup>5/</sup>, designed to control the direction of radiation of energy in order to provide a satisfactory degree of protection from harmful interference to the existing service in the United States on these channels. In order to secure maximum coverage by the new station each new licensee would authorize operation with not less than 10 kilowatts of power.

14. The operations of KFAR, Fairbanks, Alaska, on 660 kilocycles and of KOB, Albuquerque, New Mexico, on 770 kilocycles are deemed to meet the criteria of this notice for purposes herein, with no additional assignments on these two channels. These are the two exceptions concerning channels listed in paragraph (a) of Section 3.25, to which reference is made in an above paragraph.

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<sup>5/</sup> FCC, Office of Chief Engineer, Technical Research Division, T.R.R. Report 1.2.7. September 6, 1957; Suppression performance of directional antenna systems in the broadcast band.

15. In the case of each of the 23 remain channels, some portion or all of the state or states selected for the new Class II assignments is more than 1250 miles distant from the existing Class I station on the channel. Under this criterion there follows, from the geographical distribution of the existing Class I stations, the suitability of a greater number of channel assignments in the western states as compared with the central states, and in the central states as compared with the



eastern states; thus other factors being equal, the easternmost state or group of states suitable under the criterion is indicated on Table I and Figure I in each instance. Consideration has also been given to: (1) the need for protection of foreign station coverage, in accordance with the North American Regional Broadcasting Agreement and the Agreement between the United States of America and the United Mexican States concerning Radio Broadcasting in the Standard Broadcast Band; (2) the need for adjacent channel interference protection; (3) the selection of a state or states in which the particular channel could be assigned anywhere within a wide area rather than in only a few limited locations; (4) the avoidance of adjacent channel assignments in adjacent states or in adjacent groups of states, to avoid interdependence between new assignments in adjacent regions; and (5) the placement of the new assignments in many states rather than multiple assignments in a few states.

16. There are indicated in the maps attached as Exhibit C examples of the general impact upon the present capacity of the channels for skywave service resulting from 10 kilowatt directional antenna operation of new Class II stations at centralized geographic locations under Table I. These are included in the Notice for illustrative purposes only, to show the general effect of the assignments listed therein. They should not be considered to constitute a determination that the capacity of these channels should be so delimited. A decision on those issues in this proceeding relating to sharing of channels, as indicated above, will not be reached prior to our determination upon the other issues herein.

17. As stated above, the Commission has decided to afford all interested parties an opportunity, at this stage of the proceeding, to provide comments and data concerning proposals that clear channel stations be authorized power in excess of the present maximum of 50 kilowatts. While the Commission is not persuaded, on the basis of the present record, that the authorization of higher power would be in the



public interest, we defer final decision on the proposals for higher power until we have an opportunity to review the entire question in the light of updated comments and data.

18. All interested persons are invited to file, on or before November 20, 1959, comments concerning:

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(1) the plan of assigning new unlimited time stations to the clear channels listed on Table 1 and reflected in Figure I, attached hereto.

(2) the use, by Class I-A clear channel stations, of power in excess of 50 kw, under any of the proposals of record in this proceeding or any other proposals which interested parties may desire to submit. Parties desiring to do so may incorporate by reference submissions made heretofore in this proceeding.

Comments in reply to the original comments may be filed within thirty days from the last day for filing said original data, views, or arguments. No additional comments may be filed unless (1) specifically requested by the Commission, or (2) good cause for the filing of such additional comments is established. The Commission will consider such comments prior to taking final action in this matter. The requisite statutory authority is contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

19. In view of the comprehensive nature of the proceeding herein and the desirability of concluding the proceeding as soon as possible it is desired that parties submit as much evidence as possible in the exhibits which they plan to submit. All proposals and counterproposals made in the comments should supply specific data relied upon to establish the need for, and the extent of desired new service which would be provided in the particular community or communities affected; and the resulting interference limitation arising therefrom upon existing service through the confusions of the received signals.

20. In accordance with the provisions of Section 1.54 of the Commission's Rules and Regulations, an original and 14 copies of all statements, briefs, or comments shall be furnished the Commission

FEDERAL COMMUNICATIONS  
COMMISSION

/s/ Mary Jane Morris  
Secretary

[SEAL]

Attachments

Adopted: September 18, 1959

Released: September 22, 1959

[Signed by above  
Mailed by NJS  
Sep 22 1959  
Mail & Files]

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[ 4085 ]

B  
FCC 61-1106  
7705

REPORT AND ORDER  
[ 31 FCC 565-614 ]

By the Commission: Commissioner Lee dissenting and issuing a statement; Commissioner Cross concurring in part and dissenting in part and issuing a statement.

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Introduction

1. The basic question in this proceeding is whether and in what manner it would serve the public interest to amend the rules governing the use of the standard broadcast frequencies designated as "clear channels." The proceeding was instituted by the Commission on February 20, 1945, largely as a result of insistent claims that the clear

channel concept of permitting only one station to operate at night on 24 of the 107 channels available for standard broadcasting is wasteful of valuable spectrum space and otherwise not in the best interests of efficient utilization of the frequencies involved. Resolution of the matter has been complicated during the intervening years by changing treaty obligations, the necessity for disposing of precedent collateral problems, themselves difficult of settlement, and by marked changes in the socio-economic climate for a standard broadcast medium beset by the emergence of television as a vigorous competitor for audience, program material, and advertiser support. Proposals for settlement have been narrowed by the Commission's "Further Notice" of April 15, 1958, and a "Third Notice" adopted September 18, 1959. The course we take today marks our best judgment of the most practicable manner in which the clear channels can, at this stage, be better utilized to improve service in the standard broadcast band.

#### History of the Proceeding

2. Pursuant to long-standing practice and international agreement for the North American region, all United States standard broadcast stations are assigned to 107 channels, each 10-kilocycles wide, in the frequency range 535-1605 kilocycles. Unlike television, where channels were from the outset tied to specific cities, the practice of assigning standard broadcast stations to meet random demand emerged early in the development of the medium. Fixed by usage, the practice has been perpetuated under rules later developed to direct, along general lines and without reference to specific localities, the placement of stations on the 107 available frequencies in a manner designed to achieve as fully as possible the continuing objectives of

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providing: (a) some service of satisfactory signal strength to all areas of the country, (b) as many program choices to as many listeners as possible, and (c) service of local origin to as many communities as possible.

3. However, the compatibility of the objectives is confounded by the physical behavior of radio signals. Part of the energy radiated from the transmitting antenna of a broadcast station is called a ground-wave and travels closely along the earth's surface where its intensity, although diminishing rapidly with distance, remains relatively constant at any location day and night and from season to season. The portion of the energy which travels upward and outward from the transmitter into the upper atmosphere from which it is reflected back to earth at distances much greater than the reach of groundwave signals is called a skywave signal. Skywave propagation is effective chiefly during the hours between sunset and sunrise and is present, to a lesser degree, during a 2-3 hour pre-sunset buildup and a similar post-sunrise period of waning intensity. Less constant in intensity than groundwave signals, skywave signals are nevertheless capable of providing service wherever they have sufficient average field intensity above noise levels and are free from excessive interference by other stations on the same or adjacent channels. While power output and other factors affect the range of useful signals, one of the principal restrictions on a station's service area at night is the number of stations on the same frequency. It follows that a duplication of stations on the same channel to meet demands for local and multiple services dilutes the effective range of nighttime skywave propagation to distant rural areas where it may not be economically feasible to provide local transmitters.

4. The circumstance that any plan for allocating the use of a standard broadcast channel must accommodate divergent purposes led at an early stage of radio regulation to the classification of standard broadcast frequencies into several categories, each primarily directed to the achievement of one or another of the conflicting objectives. An early action of the then newly-created Federal Radio Commission was the institution in 1928 of a division of the standard broadcast spectrum into clear, regional, and local channels. Although the description "clear" was not officially applied to the unduplicated channels until the

Radio Commission's 1932 allocations rules, the clear channel concept is recognizable as early as 1923 when 40 frequencies were set aside by the Secretary of Commerce for the exclusive use of single stations. The channel classification technique survived and was perpetuated in the Federal Communications Commission's 1938 allocations plan which has endured and become the touchstone of the entire standard broadcast structure.

## [4088]

5. The existing classification of channels specifies three groups of frequencies, each with different rules for the assignment of stations depending upon the purpose for which each class of channel was established. The three groups are clear channels, which are the subject of this proceeding, regional channels on which stations are assignable under conditions permitting service to large metropolitan areas, and local channels for the assignment of large numbers of stations serving as local outlets for numerous smaller communities. In the case of regional (Class III) stations and local (Class IV) stations, which broadcast on frequencies shared with other Class III and IV stations operating in other cities and communities, protection of service is confined to their groundwave signals. Skywave or secondary service free from objectionable interference is provided only by Class I stations assigned to the clear channels, and this service is made possible only by rigid restrictions on the number of stations which may be assigned to the clear channels at night and by limitations on the radiations of the secondary stations assigned to those channels. Twenty-four U.S. clear channels are now reserved for the exclusive use at night of a single Class I-A station. On the remaining twenty-three United States clear channels one or two United States Class I-B stations are assigned under conditions requiring mutual protection through the use of directional antennas. The assignment of secondary, Class II, stations is permitted on the clear channels under conditions and restrictions which

recognize that the primary purpose to be served by the frequencies is the widespread service provided by the Class I station occupying the channel. Class II stations are expected to provide only a ground-wave service and are required, by use of a directional antenna, limitations on antenna height and power, or other means, to protect the wide area service of the Class I station. The scheme for tailoring a stations' facilities to conform to the purpose of its class is carried out in a variety of restrictions imposed on the class. These restrictions include maximum power limitations of 1 kilowatt for local stations, 5 kilowatts for regionals and 50 kilowatts for Class I and Class II stations.

6. A persistently plaguing deficiency in the allocation plan that has otherwise provided a plenitude of signals to populous centers has been the scarcity of service in the sparsely-settled areas of the country. In the face of a 50% increase in the total number of fulltime stations in operation during the 10-year period 1947-1957, the extent of land area and population receiving no nighttime groundwave service from any stations was only insubstantially altered. More than half the total land area of the United States and perhaps as many as 25,000,000 people principally in northern New England, the more mountainous regions of the Middle Atlantic states, much of the South, the northernmost part of the Great Lakes area, within the Great Plains and the mountainous areas of the West, and in Alaska are estimated to be outside the range of usable nighttime groundwave service.

7. Since domestic and international use of other frequencies preclude any realistic prospect for increasing the size of the standard broadcast band of frequencies, improvement in rural service must be sought from existing or newly -assigned stations within the present band. Little improvement may be expected from Class III or Class IV stations because of unavoidable limitations on their nighttime interference-free



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service range. Thus such improvement as may be achieved must be provided on the clear channels.

#### The Basic Conflict

8. Two basically divergent views have persisted as to the measures best calculated to make more efficient use of the clear channel frequencies. On one side, it has been urged that the principal objective of providing satisfactory nighttime service to areas lacking such service is most likely to be attained by improvement in the capacity of the clear channel stations, particularly the Class I-A stations, to provide a good skywave signal to wide areas, this to be accomplished by permitting those stations to operate at substantially increased power and by limiting, and at night excluding, co-channel stations. The conflicting view has contended for an increase in the number of unlimited time stations on the clear channels. The clear channel inquiry was instituted against this background of conflict between the basic alternatives of higher power versus duplication.

9. The Commission's Order of February 20, 1945, instituting this proceeding, was so extensive as to open the way for consideration of solutions ranging all the way between the extremes of exclusive nighttime use of selected clear channels by single stations operating at substantially higher power than the present maximum of 50 kilowatts and the reclassification of selected clear channels to local channels on which it would be possible to assign over 150 stations each, at a maximum power of 250 watts. Testimony was taken during extended hearings during 1946 and 1947 and a voluminous record compiled. At the same time, orders were issued freezing action on certain types of applications, grant of which appeared likely to conflict with reasonable settlement of the proceeding. In late 1947, the "daytime skywave" proceeding (Docket 8333), which had earlier that year been separately initiated to determine whether and the extent to which limitations should be imposed upon daytime skywave radiations toward Class I-A

and Class I-B stations, was joined with the clear channel proceeding, and extensive oral argument before the Commission was held early in 1948 on the consolidated record. The daytime skywave phase was severed in 1953 and terminated in 1959 with the issuance of a Report and Order which adopted limits of permissible radiation toward Class I clear channel stations which were to be protected against objectionable skywave interference from further grants for daytime or limited time stations authorized to operate on those channels. Immediately prior to this decision, however, the Commission on April 15, 1958, reopened the clear channel record and narrowed the proceeding for its second phase.

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#### The Further Notice

10. The Further Notice of Proposed Rule Making of April 15, 1958, invited comments on proposals to open twelve specified Class I-A channels for additional unlimited time assignments, to reserve for later determination proposals to increase power on the remaining Class I-A channels, and to leave undisturbed the Class I-B channels. On five of the twelve channels suggested for additional assignments it was proposed that there be placed a new directionalized Class I station and that the existing Class I station be required to directionalize, with the result that each station would afford mutual protection from interference to the areas served by the other. On the other seven channels, unlimited time Class II stations were proposed to be assigned in underserved areas. Comments in response to the Notice persuaded the Commission that its proposal for the licensing of such stations, because of the requirement that certain existing Class I stations directionalize their operations, would be accomplished only at the inordinate expense of substantial dislocations of existing skywave service and the unwarranted creation of new white areas. The Commission then decided to seek additional comments on a proposal to duplicate all the Class I-A

channels without the objectionable requirement of directionalization by the Class I stations. The proceeding entered its third phase, thereafter, with the release on September 22, 1959, of the Commission's re-defined proposal for settlement.

#### The Third Notice

11. The Third Notice of Further Proposed Rule Making, released September 22, 1959, invited comments on a proposal to provide for the assignment of new Class II stations on 23 clear channels,<sup>2/</sup> the new stations to be located in certain selected and designated states. The existing Class I-A stations would continue to operate with 50 kilowatts of power, but each would share operation with one new Class II station which would be located in a designated area and would operate directionally with not less than 10 kilowatts of power in order to secure maximum coverage. Although not persuaded on the state of the record at that point that higher power would be in the public interest, the Commission also provided opportunity in the Third Notice for parties to update the record on proposals to increase maximum power for Class I-A stations.

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<sup>1/</sup> To restate in detail the considerations which have led up to the Third Notice would unduly lengthen this Report and Order. Persons desiring additional details of the historical progression of this proceeding, and who are not already familiar with the record, may consult the Further Notice of Proposed Rule Making adopted April 15, 1958 (FCC 58-350) and the Third Notice of Further Proposed Rule Making adopted September 18, 1959 (FCC 59-972).

<sup>2/</sup> This includes 22 of the 24 Class I-A frequencies excluding 660 kc and 770 kc, and also includes 1030 kc, presently a I-B frequency.

12. Many parties took advantage of this invitation and in the more than 100 comments and more than 40 replies filed pursuant to the Third Notice, the basic dispute continues to be whether the additional needed service can better be supplied by permitting clear channels to operate at higher power or by permitting operation of an additional

unlimited time station or stations on the clear channel frequencies. Recognizing that half the land area of the United States (excluding Alaska and Hawaii) remains nighttime white area, dependent upon skywave service, with little prospect of large-scale improvement in primary service, one view holds that much needed improvement in standard broadcast service to these areas can be achieved only through improved and increased skywave service and that this, in turn, requires an increase in maximum power for clear channel stations to 500 or 750 kilowatts. Others contend that since many Class I-A clear channel stations are clustered in the eastern portion of the country (a natural result of the greater population density and the superior capacity of such communities to provide economic support for such stations), with 50 kw power and a nighttime skywave service range of about 700 miles, the needed improvement should come from the assignment of unlimited time stations on the Class I-A clear channel frequencies which now have only one station operating nighttime. We will direct our attention to this basic dispute after noting briefly one preliminary matter.

Shortcomings of Present Clear Channel Allocations.

13. As noted in our opening paragraph, we are concerned with whether and in what manner to amend the rules governing clear channels. Whether to amend them is comparatively simple to resolve. The proceeding was instituted because of insistent demands that present utilization is not adequate. That assumption underlies the entire proceeding. However, we must now look to the validity of that assumption and in doing so we conclude it has not only stood the test of time but that the situation has, if anything, become worse. We have noted that a great increase in the number of stations has only insubstantially reduced nighttime white area. Moreover, with our population growth, the number of people in white areas is growing.<sup>3/</sup> There is substantial support in the comments for a conclusion that the exclusive nighttime use of a channel by a single station limited to 50 kw is less

justifiable now than it was when clear channels were first allocated in this way. Since that time techniques have been established and highly developed for directional transmission of signals, with a high degree of suppression now possible to protect the service areas of co-channel stations. In addition, heterodyne interference resulting from uncontrolled deviations from the assigned frequency has been substantially eliminated. Thus it is now possible, particularly in the case of Class I-A stations located in or near the northeastern portion of the country, to assign additional co-channel unlimited time stations to provide needed service.

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<sup>3/</sup> Based on the 1940 Census a population of 23,252,000 lived in white areas. By 1957 the white area population had grown to an estimated 25,630,000.

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at distant locations, while preserving the capacity of the present station to provide a usable signal over wide primary and secondary service areas. In these circumstances there is serious question whether the most efficient use of the Class I-A clear channels can be achieved under the long-standing rules which, on the one hand, preclude power above 50 kw, and on the other hand, bar co-channel unlimited time assignments in distant areas which the present station cannot effectively serve, and where a new station could be operated so as to afford reasonable protection to the areas the present station does effectively serve at 50 kw. Almost without exception the commenting parties either note the need for additional service or at least do not attack the underlying assumption of such need. There were, however, a few comments to the effect that maintenance of the status quo would be preferable to adopting the alternative which the commenting party opposed.

#### Resolution of The Issues

14. Our review of the record and our analysis of the numerous substantive, procedural, and administrative questions which it raises



make it convincingly clear that it would be undesirable to set in motion the simultaneous reallocation of all the Class I-A clear channels. The enormity of the consequent administrative burden alone would further glut our license processing and hearing resources and delay not only the achievement of improved service on the clear channels, but additionally delay our strenuous efforts to reduce the excessive and persistent backlog of pending standard broadcast applications.

15. Quite apart from these considerations, which in our considered judgment would alone warrant progressive rather than simultaneous approaches to reallocating the Class I-A clear channels, we find compelling reasons for avoiding a course which would precipitate changed modes of utilizing the Class I-A clear channels without opportunity to review and evaluate, as we go along, the effectiveness of such reallocations as we herein adopt for some of the channels.

16. Both in the Further Notice of April 15, 1958 and in the Third Notice of September 18, 1959 the Commission invited comments on proposals to remove the heretofore total exclusivity of nighttime use of the Class I-A channels by a single station. The Third Notice contemplated additional unlimited time station assignments on substantially all of the Class I-A channels. The earlier Further Notice had looked toward this step on half of them. The underlying justification, in each case, was the compelling need to go as far as possible toward reducing the vast areas which lack any nighttime primary service. The record is replete with data demonstrating that, to an extent, this can be done with resultant increments of nighttime primary service to persons now lacking it without undue interference to the wide area service rendered by the Class I-A stations. This possibility derives from a combination of factors including directionalization of new unlimited time stations on

these channels, the long distances between their prescribed locations and the transmitter sites of the existing co-channel I-A stations and the numbers of other services available in limited areas where inter-



ference from the new station may to a limited extent interfere with present reception of skywave service from the existing Class I-A station. Moreover, the limited amount of skywave service which would be so subjected to interference is of a low order since new unlimited time stations will be required to protect the 0.5 mv/m 50% skywave contour of the Class I-A station--generally located approximately 700 miles from its transmitter.

17. These basic considerations, in our considered view, strongly underscore the desirability of permitting the establishment of new unlimited time stations on at least some of the Class I-A channels, and we make appropriate provisions therefor, in the accompanying rule amendments, on 13 of the Class I-A channels: i.e. 670, 720, 750, 760, 780, 880, 890, 1020, 1030, 1100, 1120, 1180, and 1210 kc.

18. There is support, recognized in our Third Notice in this proceeding, for the similar treatment of additional Class I-A clear channels. To pursue that course at this time would, however, be subject to the grave objections already noted. It would, moreover, in one stroke crystallize a particular pattern of clear channel usage which would at least limit and at worst frustrate the future possibilities for employing other techniques of clear channel utilization. One of these is the use of higher power to improve the nighttime range of and, within existing service areas, the quality of skywave service reaching into the vast land areas where this is the only available technique for improving service since much of those areas lie beyond the foreseeable range of the primary service of any new stations which could be fitted into the crowded standard broadcast spectrum. Whether the public interest would be served by the authorization of higher power, whether, on the channels at this time left in status quo, duplication in the manner here adopted for 13 channels would serve the public interest, or whether any other alternatives including possible combinations of these techniques would best serve to improve service on these channels, we do not now decide.

19. At earlier stages of this proceeding strong objection to the

authorization of higher power was expressed not only by interested parties but also by Congress. It is evident that in considering a question of the consequence of higher power, which would in any case be necessarily limited to a relatively few stations, the policy of the Congress should be accorded due recognition. The Senate of the United States on June 7, 1938, adopted a resolution (S. Res. 294, 75th Cong., 3rd Session) characterizing the use of power in excess of 50 kw by standard broadcast stations at "definitely against the public interest" and expressing the sense of the Senate that the Commission "should not adopt or promulgate rules to permit or otherwise allow any station operating on a frequency in the standard broadcast band...to operate on a regular or other basis with power in excess of fifty kilowatts."

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20. Some parties have throughout the long history of this proceeding forcefully urged strenuous objection against the use of higher power which, it is asserted, would give vastly undue competitive pre-eminence to the very few stations to whom in any case powers on the order of 500 kw to 750 kw could conceivably be authorized. The Commission, while aware of the strength of these contentions, cannot on the other hand ignore the potential for significant additions to service which the employment of higher power on even a few stations could make possible. Our close scrutiny of the portions of the record going to the issue of higher power fails to persuade us that, whatever the merits of the pending proposals for higher power, the objections listed against it have been sufficiently met. Upon careful consideration of the question, we conclude that there is insufficient basis before us for a finding that the public interest would be served by authorizing higher power, but that at the same time the question warrants further consideration in the light of such improvements and changes in service as may result from the action we now take to authorize additional unlimited time stations on 13 of the Class I-A clear channels.

21. We thus leave open and unprejudiced the question of whether, and if so how, the public interest would be served by changing the rules affecting the use of the 12 Class I-A channels now left in status quo. At such time as further developments, including progress under the changes we now adopt, provide needed additional light on the question we will give further consideration to how best to utilize the 12 clear channels not now disturbed. It is manifestly desirable to do so on the basis of then current data and not to hold the instant proceeding open for the purpose. Much of the record herein was compiled years ago under different circumstances which have since changed markedly, and which may be expected to undergo further change. However, in any subsequent proceedings which may be held on the disposition of the twelve channels now left in status quo, parties will be permitted to incorporate by reference specifically designated pleadings herein, or designate portions thereof, as may be relevant to matters then under consideration.

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22. In pursuing this course we follow certain basic features of the pattern proposed in our Further Notice, while departing from some elements of that proposal to which objection, which we find meritorious, was advanced. We follow that pattern to the extent that it envisaged the establishment of additional unlimited-time stations, capable of providing primary service in white areas, on about half the channels, while leaving open for future consideration and decision action on the remaining Class I-A channels.

23. The primary feature of the Further Notice which evoked critical comment from the industry, and which was a factor in our determination to consider in the Third Notice a somewhat different allocations plan, was the suggestion that certain Class I stations be required to directionalize. This factor, in the language of the Third Notice:

" would result in substantial reduction of the existing ground wave

and skywave service, with the result that substantial new 'white areas' would be created in which no ground wave service would remain available from any station and that other areas would be reduced in the number of services received from four, three or two ground wave services to a single ground wave service. In addition, substantial dislocations would obtain of present sky-wave service which would not be fully compensated by new operations."

In the approach we adopt herein the requirement of directionalization by the Class I stations has been eliminated and the undesirable results noted above would not occur.<sup>4/</sup>

24. We now have the benefit of updated comments directed to the two approaches of the Further Notice and the Third Notice. The course we take is consistent with both of these proposals in the basic sense that both proposals envisage the nighttime sharing of at least 12 of the Class I-A clear channels by more than one station. In addition, the Further Notice would reserve for future determination the use to be made of the remaining I-A channels. The method of duplication we adopt is that proposed in the Third Notice for 23 channels and proposed

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<sup>4/</sup> That we do not follow the Further Notice approach generally does not alter the validity of our conclusion that in case of one particular I-A channel -- 770 kc -- directionalization of the existing Class I station so as to afford mutual protection to a similar operation in New Mexico would best serve the public interest. We note herein the special circumstances pertaining to that channel.

in the Further Notice for 7 channels. As noted, we have (except on 770 kc) removed the directionalization requirement for Class I stations. Since the two approaches do contemplate duplication of up to 12 frequencies, we have reexamined each of the 24 Class I-A channels, plus 1030 kc which is reclassified herein as a I-A clear channel. We discuss later our reasons for selecting the 13 channels which we earmark

in this proceeding for duplication by a Class II unlimited-time station. Channel sharing on the selected 13 clear channel frequencies, as has been amply demonstrated in the comments, will not frustrate the achievement of the primary objective of clear channel allocation, i.e., to render wide area service to the residents of less densely populated portions of the country which are beyond the effective reach of interference free nighttime service from other classes of stations. The conditions projected in the Third Notice for the operation of additional stations afford a high degree of protection to the 50 kilowatt Class I-A stations now occupying these channels i.e. to their 0.5 mv/m 50% sky-wave contour. Such interference as our action herein would permit to minor, fringe reception beyond the 0.5 mv/m 50% skywave contour of those stations is, in our judgment, acceptable in view of the additional services which are thereby made possible from new stations in underserved areas.

25. While we do not now reach a decision either for or against the use of higher power, and while we thus leave entirely open the question of what station assignment plans would best serve the public interest on the 12 Class I-A clear channels left in status quo at this time, we recognize the critical importance of so tailoring the partial reallocation as to avoid undue prejudice to practical latitude for future decision. Our review of the comments persuades us that such undue restriction would have resulted from adoption of the proposal in the Third Notice to place additional unlimited-time stations on virtually all of the Class I-A clear channels.

26. Implementation of our judgment that we should at this time refrain from permitting shared nighttime use of all the Class I-A channels poses the problem of selecting, on a suitable basis, those channels on which we open the way to additional unlimited-time stations and those reserved for future decision. Numerous considerations bear on such a selection. The basic determinant is the question of whether, taking into account the numerous circumstances affecting each channel



and the resultant overall pattern of service, it is best suited to shared use or to the preservation of possibilities of wider service from the existing Class I-A station through utilization of higher power. Key factors having a bearing on this judgment include:

- a. Location of needful white areas.
- b. The possibilities for providing a primary nighttime service in those white areas at sufficient distance from the Class I-A station to permit requisite protection of the generally usable portion of the existing station's skywave service - i.e., the service area within its 0.5 mv/m 50% skywave contour.
- c. Due protection to existing co-channel U.S. daytime stations and to U.S. stations on adjacent channels.
- d. Consideration of adjacent channel interference to stations located in neighboring countries, and to foreign co-channel stations to which the United States is committed, under international agreements, to afford a stated degree of protection.
- e. Avoidance of adjacent channel interference among new unlimited-time stations assigned to the Class I-A clear channels.
- f. The location of white areas apparently beyond the reach of foreseeable new stations which could provide a nighttime primary service.
- g. Existing skywave services in the foregoing areas and the consequent benefits from improved additional skywave services.
- h. The location of Class I-A stations so situated -- with reference to geographic relationships to the needful areas and co-channel and adjacent channel domestic and foreign interference considerations -- as to indicate that they would be best adapted to the provision of additional and improved skywave services to the needful areas.

27. In the case of no single channel would all of the foregoing determinants uniformly indicate that it be earmarked for additional unlimited time assignment or that it be held in status quo for future consideration of alternative action. In each case we have arrived at



our judgment by the painstaking process of determining and evaluating all the pertinent factors and deciding, on net balance, which course would best serve the public interest both in usage of the individual channel and in terms of the resultant assembled pattern of additional nighttime primary services on the one hand, and the potential for additional and improved skywave services in needful areas on the other hand. In weighing our choices of channels to be left at this time in status quo we have taken into account the desirability of endeavoring to preserve the potential of at least four reasonably reliable and satisfactory skywave services throughout all white areas.

28. In arriving at the selection of Class I-A clear channels for duplication and for status quo, we have scrutinized with great care the entire record of this proceeding, including testimony, exhibits, briefs, oral argument, comments and other pleadings which, as we have noted, have included diverse alternatives and counter proposals.

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29. Considering all pertinent factors, and submissions, and taking into account the skywave services presently received, we have determined that the public interest will be served by deferring action at this time on the following frequencies: 640, 650, 660, 700, 770, 820, 830, 840, 870, 1040, 1160 and 1200 kc. The potential for widespread improvement in skywave service is thus preserved for future evaluation.

30. In selecting 640, 820, 1160 and 1200 kc for inclusion in this group, we have noted that these are the only I-A channels (other than 1040 and 1120 kc discussed below) serving the West; that the west is characterized by vast regions of low population density where skywave signals afford the only nighttime broadcast service; that a choice among skywave signals is not generally available to a substantial part of the West; and that acceptable locations for assignment of new unlimited time stations on these channels would, in general, be limited to eastern areas already receiving abundant service. Accordingly, at

this stage, we preserve the potential for improving skywave service which these channels afford.

31. On 660 and 770 kc, unlimited time assignments, in addition to the Class I-A stations, are already operating. For this reason, as we state in the Third Notice, no additional assignments on these channels is deemed warranted at this time. Similarly, we do not at this time take any action with respect to 830 kc because of the pendency of an adjudicatory proceeding involving WNYC's use of that frequency during nighttime hours.

32. The potential for improved skywave service which arises from the location of 650 kc at Nashville, 700 kc at Cincinnati, 840 kc at Louisville, and 870 kc at New Orleans warrants inclusion of these channels in the group as to which no action is to be taken at this time. We have examined the feasibility of duplication on these channels and, while we recognize that duplication on these channels is possible, we are reluctant to take any action at this time which would limit the potential of these stations for providing improved skywave service in underserved areas of the Southeast.

33. Of the group on which action is deferred, there remains only 1040 kc to be discussed. The Class I-A station on 1040 kc is located at Des Moines, Iowa. Both 1040 kc and 1120 kc, on which KMOX, St. Louis, Missouri, is the Class I-A station, are somewhat centrally located and those channels could be used either to provide nighttime ground-wave service to white areas in the West or to provide some improved skywave service. We have concluded that, in attempting to achieve a proper balance between the immediate benefits of duplication and retaining a potential for improved skywave service, it is preferable to defer action on 1040 kc but to permit an additional station on 1120 kc. An important factor in making this choice was a realization that the potential of 1120 kc for providing improved skywave service is considerably limited in all directions by adjacent channel operations at Omaha, Nebraska, Charlotte, North Carolina, Shreveport, Louisiana, Minneapolis, Minnesota, and New York, New York.

34. Turning now to the remaining Class I-A channels, we have determined that they can best be utilized by permitting operation of an unlimited time Class II station on each, thereby serving the important and immediate objective of providing nighttime primary service to white areas. This is not to indicate that other channels, among the group not presently duplicated, could not be duplicated and provide valuable service to white areas. As we have indicated, our action here leaves to future determination, in the light of future developments, the decision as to what use should be made of those channels on which the status quo is presently retained.

35. We conclude that the proper balance between immediate objectives and possible future goals is best achieved by deferring action on the channels noted above and by permitting one new unlimited time operation on the following: 670, 720, 780, 880, 1020, 1030, 1100, 1120, 1180 and 1210 kc. In addition 750 and 760 kc will be duplicated but in a way designed to meet special situations arising out of the entry into force of the United States/Mexican Broadcasting Agreement.

36. Class I-A stations on 880, 1020, 1030, 1100, 1180 and 1210 kc are located at or near the northern or eastern boundaries of the country thereby affording maximum opportunity for assignment of unlimited time stations in the West where serious deficiencies in present service exist and the corresponding need for improvement is great. Such location permits flexibility in meeting the required spacing between co-channel Class I-A and unlimited time Class II stations. Moreover, the impact of the new unlimited time Class II stations on the present skywave service of these Class I-A stations will be at a minimum because the useful skywave service these stations render is generally confined to the extreme northeastern portion of the country.

37. The Class I-A stations on 670, 720, 780, and 890 kc are located in Chicago and, while they are, of course, west of the group just discussed, they still offer useful opportunity for assignment of unlimited time stations in the far West. Several western states will

meet spacing requirements and, additionally, the useful skywave service provided by the Chicago I-A stations is confined to the region of the Great Lakes which insures a minimum impact by the new co-channel unlimited time Class II stations to their skywave service. An added consideration in selecting the Chicago I-A frequencies for duplication is the limited potential which they have for improving skywave service in areas which need it. Adjacent channel Class I operations in New York would limit radiation to the east and requirements of protection to stations in Cuba and Mexico would limit radiation to the south. Their potential for improving skywave service to the west, moreover, is not so great as that of the Class I-A channels on which we are presently retaining the status quo.

38. We have already discussed 1120 kc. The special considerations concerning 750 and 760 kc are treated separately in subsequent paragraphs of this Report and Order.

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39. Our decision to permit nighttime sharing of 13 of the Class I-A clear channels could be implemented in several ways. If we were to follow the practice heretofore established in assigning new standard broadcast stations, applications meeting announced interference criteria and other technical standards would be accepted and processed without confining such applications to designated areas. This would not be practicable here. The acceptability of any location proposed for new unlimited stations on clear channels depends not only upon requisite protection to existing stations but also upon avoidance of undue interference among the new stations so assigned. This means that if we followed the general basis for standard broadcast station assignments we could expect to receive considerable numbers of mutually exclusive applications which conflict either because they propose mutually inconsistent uses of the same frequency or because they propose conflicts as to acceptable locations of new adjacent channel assignments on Channels 10, 20 and 30 kilocycles removed from the channel applied

for. For these reasons the hitherto customary approach to new station assignments could be expected to require numerous complicated and interrelated hearings which would be vastly and unnecessarily time consuming.

40. Much of this impediment and delay can be avoided by the system we here adopt--of designating the particular state or states within which each of the I-A channels to be duplicated will be available for an additional unlimited time station. The states so designated have been selected with a view to making the most fair, equitable and efficient use of the frequency taking into account limitations imposed by the need to protect existing co-channel and adjacent channel stations, the areas of greatest need for additional nighttime primary service and the avoidance of undue mutual interference among the new stations themselves. Due regard has additionally been given requisite protection to stations in neighboring countries.

41. In the interests of fulfilling to the greatest possible extent the prime objective of the new unlimited time stations on the Class I-A clear channels -- i.e. to create new primary services in white areas -- we propose, as detailed below, to give preference to those applications which most fully serve this objective; and we will not consider any application for a new unlimited time station on one of the Class I-A channels unless it meets a specified minimum criterion for new primary service to white areas.

42. For the foregoing reasons we reject proposals that we fix by rule the specific communities in which these frequencies may be so used. It would not be possible to anticipate, in advance of the filing of specific station assignments, the finite circumstances of principal city and radiation pattern which could best serve the objective of clear channel duplication. We leave this for decision on the basis of applications to be submitted in accordance with the rules herein adopted.



43. As to the suggestion that more than one unlimited time Class II station be authorized on the same Class I-A channel, we deem it preferable at this time to permit only one unlimited time Class II station on the channels selected for such use. After we have the benefit of the manner in which the new unlimited time Class II stations are utilized, and details of actual performance, interference, etc. become available, we will be in a position to determine whether the public interest warrants assignment of additional unlimited time facilities on these channels, and, if so, to determine under what conditions they should be permitted. We are convinced, however, that such a decision should await further developments and that extension of the plan adopted herein to include such multiple use is not warranted at this time.<sup>5/</sup>

44. The record also reveals that many of the comments requesting Class II facilities come from parties seeking to improve their existing service--which is all too often in the areas of concentrated population where little "white area" would be served. We have emphasized our aim of securing standard broadcast radio service to those areas which lack nighttime primary service. The standards we adopt herein are directed toward the achievement of that end and represent our considered judgment of the best way to fill these gaps in service at this time. In considering applications for Class II facilities on these clear channels we shall look closely at the applicants' plans for serving such "white area". The extent to which the facilities thus made available are ultimately utilized is, and necessarily so under our free competitive system, dependent upon the business judgment of prospective applicants and licensees. The fact that the theoretical optimum of service is unlikely of practical attainment due to such considerations as population distribution does not preclude our adopting a solution which more nearly achieves the objectives of broadcasting in the standard band than does the present utilization of Class I-A clear channels at night by only one station. The net result of the action we take today is to open the way for additional nighttime primary service to the public, especially in those areas where such service is needed,



while at the same time holding to a minimum any loss of existing service to the listening public.

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<sup>5/</sup> In this connection, Argonaut Broadcasting Company, Standard Broadcasting Company, and Seattle, Portland and Spokane Radio filed a joint petition for acceptance of supplemental comments on July 7, 1961, seeking consideration of multiple nighttime use of the channels on which they operate limited time stations. The comments were filed more than one year after the record in the proceeding had been closed. Moreover, they came after public announcement of instructions by the Commission to its staff. The orderly processes of rule making required that petitions so filed be denied. In any event, as noted in the text, it has been decided that multiple use (i.e. nighttime sharing of the frequency by more than the Class I and a single Class II station) is not warranted at this time but should await further developments. The petition for acceptance of late comments filed by John Poole Broadcasting Co., Inc. is also denied. That petition was also filed more than a year late and is an attempted reargument of matters already presented in timely comments and considered by the Commission. Several oppositions were filed to each petition.

## [4102]

45. Moreover, it is expected that, upon final resolution of this proceeding, applications may be forthcoming from parties who have not commented in this proceeding and that additional sites within the states selected, will be proposed. We can in a comparative hearing consider, inter alia, the white area population expected to be served under the various proposals. Indeed, prospective applicants should be aware that we intend, absent decisive countervailing circumstances, that as between fully qualified applicants complying with all our Rules, the one who will serve the largest white area population will receive the grant. Parties are thus forewarned that white area population served rather than total population served is of prime importance herein. We can foresee at this time only one kind of circumstance in which it may be anticipated that the grant should not necessarily go to the qualified competing applicant proposing the first primary service to the largest number of people. Under Section 3.182(g) of the rules, primary service

is not considered to exist in towns with a population from 2,500 to 10,000 if available groundwave service has a field intensity of less than 2 mv/m. It is possible that one applicant for an unlimited time Class II station may be in a position to show that he would provide a first nighttime primary service to more people than a competing applicant, in reliance upon his provision of groundwave service with a field intensity of 2 mv/m or better to persons living near enough to an existing unlimited time station, so that they now receive service of 0.5 mv/m or better, although less than 2 mv/m. Some usable groundwave signals, although not of the standard contemplated in Section 3.182(g), are thus available to persons so situated. A competing applicant, on the other hand, may be in a position to demonstrate that he proposes a first groundwave service to a larger number of people who do not now have an 0.5 mv/m groundwave signal or better available to them. Considering the objectives of our rule changes herein, it would be appropriate, in reaching our decision in such case, to take this circumstance into account and not necessarily to grant perfunctorily an application which reflects a first primary service to the largest number of people by virtue of including in the count persons who, although they do not receive the 2 mv/m signal prescribed in Section 3.182(g), are nevertheless able to receive a signal of at least 0.5 mv/m.

Standards Governing New Station Assignments

46. In light of the fundamental concepts which we have enunciated above -- and considering that the I-A channels are those which must be primarily looked to for the improvement of overall standard broadcast service -- we adopt the following allocation standards, looking toward the assignment of unlimited-time stations herein classified as II-A stations. The Class I stations now licensed to operate exclusively in the United States on these channels, listed in the Table in Section 3.22 of the Commission's Rules, will continue to operate with 50 kilowatts of power but will share operation on the channel with one newly licensed station located in the designated area. These additional assignments are those which, from a careful analysis of the entire allocation picture, we have determined will go furthest toward achievement of our objective, provided they meet certain standards as to power and service to "white areas". The applicable standards are:

(1) The application must be for assignment to a community within the state or states specified in the Table in new Section 3.22 of the Rules.

(2) The application must be for unlimited time operation with no less than 10 kw nighttime power. A few parties have suggested that lower power should be considered. Minimum power as herein specified is necessary if a substantial amount of badly needed nighttime primary service is to be provided and we affirm our earlier judgment in this respect. While it is anticipated that these stations would also operate ordinarily with at least 10 kw power daytime, in some cases requirements of protecting existing nearby daytime stations may require that the new station operate with lower power daytime, and accordingly, to provide more flexibility with respect to the new assignments, we do not impose such minimum requirement as to daytime power.

(3) At least 25% of the area or 25% of the population within the station's nighttime interference-free service contour must not receive nighttime interference-free primary service from any other station.

Applications not meeting all of these standards will not be in compliance with our Rules and will not be accepted, but will, if tendered, be returned.

57. Additionally, the new Class II-A stations will be required to observe the following protection requirements:

(1) Daytime protection standards for existing Class I-A stations will be as prescribed in the present rules.

[4104]

(2) Nighttime standards will require that the existing Class I-A station normally be protected to its 0.5 mv/m, 50% skywave field strength contour.<sup>6/</sup> The location of this contour will be determined in accordance with procedures specified in the present rules for Class I-B stations and the 10% skywave signal from an interfering station on the same channel shall normally not exceed 25 uv/m at this contour.

(3) In addition to providing protection to the existing Class I-A stations, the new Class II-A stations will be required to afford protection to existing stations of other classes, as prescribed for Class II stations in accordance with present rules, except to facilities granted after October 30, 1961.

Determination of service and interference with respect to Class I-A Stations

48. In order to implement the assignment plan and to insure that the Class II-A stations provide needed service while imposing a minimum impact on the service of the existing Class I-A stations, the Commission, in its "Second Supplement to the Third Notice" released February 19, 1960, sought comments concerning proposed engineering standards for the limitation of nighttime co-channel interference to Class I-A stations. Almost without exception, the comments and engineering statements which have been submitted proposed adoption of standards which are

based either on the definitions of service given in Exhibit 109 of this proceeding or on the present Commission Rules relating to operation of stations on Class I-B frequencies.

49. The Commission has previously recognized Exhibit 109 as "the most comprehensive and realistic tool yet devised for evaluation of standard broadcast service" (emphasis added). A number of comments noted however, and we agree, that adoption of standards based upon definitions of service given in this Exhibit would not lend themselves to convenient administration. We are disposed to assign considerable weight to the requirement that standards be susceptible of practical administration, in order to facilitate implementation of the allocation plan we adopt with minimum procedural delays. Observing this criterion, and giving due consideration to all comments filed, we have determined that the new assignments on Class I-A channels provided for herein shall be based on somewhat simpler concepts along the lines presently embodied in our Rules -- i.e., protection of the Class I-A stations normally to their 0.5 mv/m 50% skywave contours. However, location of 50% and 10% time skywave contours will be determined by a method slightly different from that now used on clear channels -- i.e., by use of skywave curves contained in a new Figure 1a of Section 3.190, which are the same as those contained in Appendix E to Annex 2 of NARBA; and, as to pertinent angle of departure, use of present Figure 6a of Section 3.190, which is now used for frequencies other than clear channels (as to which Figure 6 is used), and which is the same in pertinent part as Appendix F to Annex 2 of NARBA. The location of the 50% time contour will be determined by the use of Curve number one of Figure 6a, with the title of that figure modified accordingly. For the time being, assignments on Class I-B channels

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<sup>6/</sup> We recognize the importance of clear channel service to national defense communications and in emergencies, and find substantial support in the comments to the effect that if there is to be duplication the existing Class I-A stations should be protected to their 0.5 mv/m 50% skywave contour.

[4105]

will continue to be based on Figure 1 and Figure 6 of that section. <sup>6a/</sup>

50. Use of the new Figure 1a and Figure 6a, the NARBA curves, instead of present Figures 1 and 6, has several advantages. First, it makes more uniform the treatment of applications from a domestic and from an international standpoint. Second, as a step toward elimination of Figures 1 and 6, it works toward simplifying the Commission's rules by providing for only two standards instead of the present three. Third, use of the NARBA skywave curves and the more refined Figure 6a, angle of departure curves, will give somewhat more realistic results in terms of extent of service, interference and protection. Fourth, the computation process involved in using new Figure 1a and Figure 6a is somewhat simpler. Lastly, use of these figures -- especially 6a instead of 6 -- will result in more complete protection of the I-A station to its 0.5 mv/m 50% skywave contour, the desired objective. We have also considered the use of the latitude-corrected curves contained in Figure 2 of Section 3.190, which are the same as the 10% time curve contained in Exhibit 109; but we conclude that the considerations of simplicity mentioned above make preferable the use of the standards adopted here.

Service to nighttime "white areas"

51. We have set forth above a minimum standard which the proposed new Class II-A assignments must meet in order to be entitled to consideration under our new rules -- that at least 25% of the area or population within its nighttime interference-free service contour must not now receive any nighttime interference-free primary service from another station. We adopt this minimum criterion because obviously a proposed operation which would not add this much service to present "white" areas would not greatly serve to fulfill our objective, and at the same time would probably, if not certainly, block a later operation which would be of more value in this connection. We believe that prospective applicants in each case can and should be expected to pick locations and design operations which will meet this criterion.



### Application Processing

Applications for Class II-A assignments will not be placed in our normal processing line, but will be processed immediately. This is necessary if our objective, which these are the chief and first means of fulfilling, is to be attained with reasonable promptness. We disfavor exceptional priorities in license processing except where the most compelling circumstances call for them. It is unquestionable, in our considered judgment, that the public interest in improved and increased AM broadcast services will be far better served by proceeding with the least possible delay to deal with Class II-A assignments, than by requiring them to wait until many hundreds of more routine applications which were previously filed have first been disposed of.

6a/

Because of the large distances involved between co-channel stations, the use of the frequencies 660 kc (New York City and Fairbanks, Alaska) and 770 kc (New York City and Albuquerque) will not be affected by the substitution of Figures 1a and 6a for Figures 1 and 6. This is primarily because at the distances between one station and the 0.5 mv/m 50% sky-wave contour of the other (more than 1400 miles) the pertinent angle of departure is virtually zero under either Figure 6 or Figure 6a.

[4106]

53. We will, however, allow a period of 90 days after the effective date of the rule amendments herein for the filing of applications for Class II-A stations before acting upon any of them, in order to afford reasonable opportunity for the submission of other applications which may more effectively serve the major objective of reducing nighttime white areas. Where more than one application for an assignment provided for herein is filed, a comparative hearing will, of course, be required.

### Prohibition of new daytime assignments on Class I-A channels

54. For a number of years, we have been concerned with the crowding, and indeed over-crowding, of the daytime standard broadcast spectrum, which has not brought a corresponding gain in service. Not only has such intensive crowding of stations into the spectrum not

brought the amount of needed additional service which had been hoped for, but it has been argued that economic limitations on programming for very limited audiences in very small interference-free service areas have prevented individual stations from rendering the quality of broadcast service which they might otherwise provide. It is the I-A channels to which we must look primarily for achievement of our overall allocations objectives. Therefore, for these and related reasons, we have concluded that the I-A channels should not be opened for the assignment of stations on the same uncontrolled basis prevailing in the AM service generally, where each application is considered separately except with respect to conflicting applications or objectionable interference to specific existing stations. Further assignments on the I-A channels should be made in accordance with an overall plan which will achieve our various objectives, including provision of maximum service to underserved areas, provision of local outlets for the maximum number of communities, and others.

55. We have achieved such plan with respect to the making of the Class II assignments provided for herein. After the specific location and facilities of the Class II stations have become established, the way would be open for consideration, in subsequent rule making proceedings, of any further proposals which may be submitted for additional unlimited-time Class II assignments on the Class I-A channels in question. As in the case of the Class II-A assignments for which we now provide, any such rule making proposals would be examined in the light of the prime objective of further reducing nighttime white areas while at the same time affording due protection to the co-channel Class I-A station.

56. In the circumstances we are amending the rules to remove provision for new daytime stations on the 25 Class I-A clear channels. Pending applications therefor will be dismissed. It is evident that

[4107]

the assignment of new daytime stations on the Class I-A channels could in many instances frustrate the future optimum use of these channels

for additional unlimited-time stations. Considering the potential reach of co-channel interference, the making of numerous daytime assignments on these channels could seriously impair the value of the new Class II-A assignments through extensive daytime interference to the new Class II-A station and by imposing protection requirements which the new Class II-A station would have to meet. Moreover, new daytime stations on the 12 Class I-A channels now held in status quo could hinder or obstruct whatever further use of the channels -- higher power and/or additional unlimited-time assignments -- may later be found appropriate in furtherance of our objective of improved overall radio service.

#### Adjacent Channels

57. Our Rules take into account objectionable groundwave interference not only between co-channel stations but also between stations 10 kc and 20 kc removed. As to skywave interference the Rules (Section 3.182) take into account objectionable skywave-to-groundwave interference co-channel and between stations 10 kc removed.<sup>7/</sup> The Rules (Section 3.37) also provide that two stations will not be authorized 10 or 20 kc removed when the 2 mv/m groundwave contour of one would overlap the 25 mv/m contour of the other, or 30 kc removed where the 25 mv/m groundwave contours would overlap.

58. Aside from some of the Class I-A channels themselves (as to which, since there will for the time being be no further applications other than those specifically provided for herein, no further consideration need be given in this connection), there are a total of 33 frequencies which are located adjacent to -- i.e., within 30 kc of -- one or more Class I-A channels. These include 14 I-B channels (other than 1030 kc, herein reclassified as I-A), 10 channels on which Canada or Mexico has priority for Class I-A use, 7 regional channels, and the two local channels 1230 and 1240 kc. In our judgment, it is obvious that we should not proceed to grant applications for these frequencies where the operation proposed would have a substantial impact on future optimum use of the Class I-A channels, either the specific use provided herein for 13 of them, or possible future uses of the other 12

which are to be the subject of continuing study.

7/ Objectionable interference exists where the ratio between desired and undesired groundwave signals is less than: (1) co-channel, 20 to one; (2) 10 kc apart, one to one; (3) 20 kc apart, one to 30 (Section 3.182(w)). Adjacent channel (10 kc removed) skywave-groundwave interference exists where the ratio is less than one to five. The rules also recognize adjacent channel (10 kc removed) groundwave-to-skywave interference; but since only Class I stations are generally regarded as rendering skywave service, this problem does not arise here.

[4108]

59. The problem of protecting against such adverse impact from adjacent channel operations has two parts:

- (1) protection of the new unlimited time Class II assignments on 13 Class I-A channels from new or changed operations on adjacent channels which would thwart such new Class II assignments or jeopardize their value because of interference caused or received, or involve prohibited contour overlap;
- (2) protection of the future use to be decided upon for the remaining 12 Class I-A channels upon which the status quo is retained for the present.

Different kinds of restrictions are necessary with respect to frequencies adjacent to the two groups of Class I-A channels involved in (1) and (2) above. Since some frequencies are adjacent to Class I-A channels in both groups, it will be necessary (with the exceptions noted below) to impose both kinds of restrictions as to the adjacent frequencies so situated.

#### Protection with respect to New Class II Unlimited Time Stations

60. The frequencies which are adjacent to the Class I-A channels on which we now permit new Class II unlimited time assignments are:  
 680, 690, 710, 730, 740, 790, 800, 810, 850, 860, 900, 910, 920, 990,  
 1000, 1010, 1050, 1060, 1070, 1080, 1090, 1110, 1130, 1140, 1150,  
 1170, 1190, 1220, 1230 and 1240 kc.

we find that in order to avoid undue risk of mutual interference or prohibited overlap between stations on these frequencies and the new unlimited time Class II stations, which would seriously impair the value of the latter, it will be necessary to process applications on the above-listed frequencies in accordance with the provisions of paragraph (a) of the appended revision of Section 1.351 of the rules. When it appears that the adjacent channel facilities requested would involve undue risk of objectionable daytime or nighttime interference to, prohibitive daytime or nighttime interference from, or prohibited overlap with, a possible Class II assignment as provided herein, the possibly conflicting application will not be granted but will be held pending until the location of the new Class II station and its mode of operation are determined. If a hearing on the possibly conflicting application is in progress or is ordered for other reasons, the hearing will include an issue as to effect to or from the new Class II assignment. When the location and facilities of the new Class II station are determined, the other application will be: (1) granted (or otherwise acted upon independently or the new Class II assignment), if it appears that interference or overlap conditions as mentioned would not exist; or (2) designated for hearing, where it appears that such conditions would exist. The hearing will not be comparative, but will be upon the issue of whether, with the Class II station operating as proposed, grant of the other application would serve the public interest, taking into account the extent of interference or overlap between the two operations.

## [4109]

61. In giving the foregoing priority to Class II assignments over conflicting assignments on adjacent channels we depart from long established bases for comparative consideration in such cases. We do so with full awareness of the requirements under Section 307(b) of the Communications Act for fair, efficient and equitable distribution of radio facilities. After the most painstaking consideration we conclude



Protection with respect to Class I-A channels left in status quo

63. The following frequencies are adjacent to the 12 Class I-A channels which for the time being we leave in status quo:

610, 620, 630, 680, 690, 710, 730, 790, 800, 810, 850, 860, 900,  
1010, 1050, 1060, 1070, 1130, 1140, 1150, 1170, 1190 and 1220 kc.

## [4110]

We find that in order to avoid undue risk of frustrating future improvements to service on the 12 Class I-A channels now left in status quo (whether by possible future authorization of higher power, by possible future Class II unlimited time assignments, or by possible combinations of these techniques) it is necessary to apply to applications on the above listed adjacent frequencies the restrictions set out in paragraphs (b) and (c) of Section 1.351, as herein amended. We have omitted from the foregoing list two frequencies (740 kc and 1230 kc) notwithstanding the fact that, like those listed, they also are adjacent to Class I-A channels now held in status quo.<sup>8/</sup>

64. The restrictions we impose on the adjacent frequencies listed in paragraph 63 will be maintained until September 1, 1964, by which time it is expected that we will be able to decide the future use of the 12 Class I-A channels now left in status quo. Should earlier decision be reached, it will be possible to shorten this period. In the interim we deem it necessary to defer the processing of all applications for new facilities on the listed frequencies, or for the change of existing stations to these frequencies. Only by this means is it possible to safeguard effectively against the assignment of new stations which could obstruct the possibilities for meaningful improvement of service by whichever of the techniques it may be found best to employ in improving service on the Class I-A channels now left in status quo. Additionally, as provided in the appended amendment to Section 1.351, we will examine requests for modifications of outstanding authorizations on the frequencies listed in paragraph 63, with a view to insuring that those which propose increases of power, or which seek authorization to operate existing



that, in view of the paramount importance of enabling the new Class II-A stations to achieve -- the greatest extent possible -- the primary objective of reducing nighttime white areas, for which Class I-A frequencies are best suited, it could only frustrate the effective implementation of Section 307(b) and invoke wasteful hearing processes to no useful end, to apply here the long established route of the comparative routines which have hitherto been generally followed. In our judgment, the public interest will be much better served by giving the Class II-A stations the protection discussed above. Such action, although not conforming with past routines, is not unprecedented. It is basically similar to the precedence given Class I-A assignments over conflicting applications in the interest of service to areas which it is impracticable to reach with other classes of stations. Similar precedence in the case of the Anchorage and San Diego assignments is required in order to effectuate adjustments necessary to meet this nation's international obligations.

62. It is apparent from the foregoing that we do not contemplate grant of any applications for facilities which would prevent making the new unlimited time Class II assignments established herein, or which could not co-exist with them. It is possible, however, that some assignments on adjacent frequencies may receive interference from these subsequently authorized Class II stations. Therefore, in order to provide the greatest opportunity for these new Class II assignments in furtherance of our objectives, and in order that, where appropriate, such assignments may be implemented without the cumbersome and time-consuming adjudicatory processes often involved in new AM assignments, we will impose, as a condition on any grant of an application for new or changed facilities on one of the frequencies listed in paragraph 60, the condition that the grant is subject to whatever objectionable interference may be received from any of the new Class II unlimited time stations provided for herein. Our rules are amended so as to provide that all grants involved are so subject, and every authorization on any of the indicated frequencies will carry this condition.

stations during nighttime hours not now authorized, will not prejudice the effectuation of service improvements on the 12 reserved Class I-A channels. Action will be deferred until September 1, 1964, on applications which we find would jeopardize such improvements.

65. It is because of the relative degree of possible impact that, in the restrictions summarized in paragraph 64, we have made a distinction between applications for new facilities and those for certain major changes. The effect of a change in facilities (without change of frequency) is more predictable in terms of possible impact on adjacent Class I-A channels, if for no other reason than that the station whose

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8/ Despite these adjacencies, it is not appropriate to subject 740 kc and 1230 kc to the same restrictions which are applied to the other frequencies listed in this paragraph. 740 kc is adjacent to 770 kc. The limits of future use of 770 kc are sufficiently defined by previous Commission decisions as to establish the degree of protection required to be provided to stations assigned to this channel. The special circumstances pertinent to 1230 kc are noted below in paragraph 67.

[4111]

facilities are to be changed is already in existence, radiating and entitled to protection, and therefore -- whatever may ultimately be determined as the optimum use for the Class I-A channel -- the inhibiting effect on such use from the proposed change in facilities will often be inconsequential. In the case of a new station, on the other hand, the facilities would represent, almost by definition, a substantial new factor on the frequency which would have to be reckoned with in deciding the ultimate use of the adjacent Class I-A channel. This is true both because of the interference potential of the new operation, involving radiation in an area of the country where usually it did not exist before on that frequency, and because the new operation would be entitled to some degree of protection and would thus impose a limitation on use of the adjacent I-A channel in that area. Thus, until final decisions are reached as to the future uses of these Class I-A channels, any new station on an adjacent channel is quite likely to have a damaging adverse impact. We

must, therefore, defer action on all such applications for the three-year period mentioned, i.e., until September 1, 1964, unless appropriate over-all decisions can be made earlier.

Protection with respect to adjacent Class IV channels

66. We recognize the need for exceptional treatment of 1230 kc and 1240 kc, which are Class IV channels. Both are adjacent to 1210 kc on which a new Class II-A station is proposed. Under separate rule amendments previously adopted the Commission has increased the daytime maximum power of Class IV stations from 250 watts to 1 kilowatt. There is strong reason for keeping the way open to the prompt processing of applications for such daytime power increases, in order that, insofar as possible, Class IV stations still operating with less than 1 kw daytime may have the opportunity to offset the interference effects of power increases by other Class IV stations. Since the power increase is confined to daytime hours, since there is a maximum limit of 1 kilowatt, and further, in view of the fact that the adjacencies here involved are 20 and 30 kc removed from the pertinent Class I-A channel, the regular processing and grant of these applications may not be expected to interfere unduly with the assignment of a Class II-A station on 1210 kc. Applications on 1230 and 1240 kc other than for daytime power increase will be considered in the light of possible impact on the Class II-A assignment, as provided in the revised Section 1.351 of the rules.

67. For similar reasons, we refrain from imposing further restrictions on the use of 1230 kc, notwithstanding the fact that it is additionally adjacent to 1200 kc, one of the Class I-A channels on which we now preserve the status quo. Owing to the remoteness of the adjacency involved (30 kc removed), and the limitations otherwise imposed by our rules on the use of Class IV frequencies, we find that no useful purpose would be served by barring new Class IV assignments on 1230 kc, or by otherwise limiting the use of this channel.

Resultant Revision of Freeze Rule

68. Hitherto, under a blanket freeze imposed by Section 1.351 of the rules, the processing of all applications of designated types on all Class I-B channels within 30 kc of Class I-A channels has been deferred. Under Section 1.351 as herein amended, the processing of applications on frequencies adjacent to the Class I-A channels will, with one exception, no longer be deferred. Instead, (with the one exception of applications for new stations on designated adjacent frequencies) processing of applications will proceed in the normal course. Only where it is determined that the grant of an application would jeopardize improvement of service on Class I-A channels as contemplated herein will we defer action on the adjacent channel application until further developments make it possible to evaluate the matter definitively.

69. While we thus moderate the former freeze, we at the same time have found it necessary, for reasons already stated in some detail, to extend to additional adjacent frequencies the remaining restrictions applied to preserve due latitude in making the most fair, efficient and equitable possible use of the Class I-A channels. Specifically, we now bring within the purview of the amended Section 1.351 frequencies which, like those formerly included, are within 10, 20 or 30 kc of a Class I-A channel. Although the rule had formerly applied only to Class I-B channels so situated, it has frequently been pointed out that, so limited, the rule hazarded damaging assignments on other classes of similarly adjacent channels. Since the only "freeze" (i.e., deferrment of application processing) now retained has been narrowed to new assignments on channels adjacent to 12 of the Class I-A channels, Section 1.351, as amended to include additional adjacent channels, will have less restrictive effect than if these channels had been so included when the "freeze" provisions applied to frequencies adjacent to all of the Class I-A channels. The fact that, animated by the desire to restrict the freeze, we formerly confined it to adjacent Class I-B channels, did result in assignments on

similarly adjacent frequencies of other classes which to an extent have hampered and limited our efforts to make optimum use of the Class I-A channels on which we have found it desirable to permit new unlimited time Class II stations. This experience has demonstrated that continued omission of some adjacent frequencies from the restrictions imposed under Section 1.351 is bound to create progressively serious jeopardy to the realization of the vital and basic objectives of the best utilization of the Class I-A clear channels. We thus have found it imperative to adjust section 1.351 in the manner described above. We do so with regret that it will create some delays, and only after reaching the considered judgment that, taking all pertinent factors into account, the public interest will be best served by the course here adopted.

[4113]

#### Some Specific Problems

70. A few specific problems and areas of comment should be noted at this point. As we noted in our Third Notice, the operations of KFAR, Fairbanks, Alaska, on 660 kc and of KOB, Albuquerque, New Mexico, on 770 kc, have caused us to conclude that no additional assignments on these two channels are warranted at this time.

71. One specific proposal for use of 770 kc was received but it was a proposal for multiple use of the frequency. We have already denied requests for multiple use at this time. Meredith Engineering Co., National Weekly, Inc., and Sky Broadcasting Service all sought multiple use of 660 kc in various diverse locations.

72. One other related proposal is the suggestion by WJR, The Goodwill Station, Inc., Detroit, the I-A station on 760 kc, that the use of 760 kc by KGU, Honolulu, Hawaii, should be considered as the duplication of that frequency and no further assignments made thereon. We cannot agree. In the case of 660 kc, we have recognized that because of the paucity of radio facilities operating in Alaska, it would be inadvisable to permit the same amount of interference to reach that area as



we do in the remaining states where some 3400 radio stations are in operation. Alaska, with its vast remote area, is highly dependent upon its radio services. KFAR can serve most of Alaska, which obviously does not receive services from other states, but could not do so if we authorized another station on 660 kc somewhere in the Southwest. We are motivated in this regard by the need for protection against the potential interference which would be caused to the Alaska station by a new Class II station so located that it would protect the dominant station and also comply with restrictions caused by operation of a co-channel station in Cuba. There is no similar need to protect 760 kc in Honolulu, several thousand miles from the mainland. Moreover, it is WJR, the I-A station on the frequency, which makes the suggestion -- and not KGU. WJR, along with all other Class I-A stations, will be protected to its 0.5 mv/m 50% skywave contour.

640 kc and 830 kc

73. While neither 640 kc, on which KFI operates as the I-A station at Los Angeles, nor 830 kc, on which WCCO operates as the I-A station at Minneapolis, is authorized for use by a Class II-A station, both of these frequencies should be given special attention here because of pending hearings which involve the question of additional use of those frequencies.

74. On 640 kc, Station WOI, Ames, Iowa (which is regularly licensed to operate on this frequency daytime with 5 kw non-directionally), operates with 1 kw power from 6:00 a.m. (C.S.T.) to sunrise at Ames, which is during nighttime hours when sunrise is later than 6:00. Notwithstanding the fact that this operation does not meet the conditions of Section 3.78 of the Rules concerning pre-sunrise operation of daytime stations on clear channels, the Commission has, since 1944, authorized such

pre-sunrise operations by WOI under a series of Special Service Author-



izations (and more recently under other temporary authority), a type of authorization employed in exceptional circumstances to permit uses of AM frequencies for which provision is not made in the general rules. There is currently pending an adjudicatory proceeding, Docket No. 11290, in which there is at issue the basic question of whether the public interest would be served by continuing to authorize WOI's pre-sunrise operation.

75. Since 1943, WNYC, a municipally owned and operated station at New York City, has been permitted under a series of temporary authorizations to operate on 830 kc during certain nighttime hours: 6:00 a.m. (E.S.T.) to local sunrise and from sunset at Minneapolis to 10:00 p.m. (E.S.T.), with power of 1 kw. (WNYC's regularly licensed limited time operation on 830 kc is at 1 kw power, with a different directional antenna). Notwithstanding the directional antenna employed, WNYC's operation during nighttime hours causes interference within the secondary service area of WCCO at Minneapolis. In a pending adjudicatory proceeding (Docket No. 11227) consideration is being given to the question of whether, balancing the interference caused to WCCO against the service WNYC renders during nighttime hours, the public interest would be served by continuing to permit WNYC's nighttime operation, for which no provision is made in the AM rules governing the use of Class I-A frequencies.

76. We do not here decide upon or prejudice the decision in those adjudicatory proceedings. In one pertinent respect, however, it is appropriate to take action in this proceeding by way of amending the clear channel rules to establish the basis for the regular licensing of WOI's pre-sunrise operations and WNYC's nighttime operations so that in the event it is decided in the adjudicatory proceedings that such operations are in the public interest the way will be clear procedurally for applications to be filed for such operations on a regular basis.

750 kc and 760 kc

77. In two instances we have provided for a solution to special problems arising by virtue of the entry into force of the United States-

Mexican Broadcasting Agreement, by allocating 750 kc to Anchorage, Alaska for use by station KFQD and 760 kc to San Diego, California for use by station KFMB.

78. The Agreement between the United States of America and the United Mexican States Concerning Broadcasting in the Standard Broadcast Band signed in January, 1957, gives Mexico a Class I-A priority on 540 kc and thus precludes its continued use at San Diego. While discontinuance of this particular use of 540 kc in the United States is offset by advantages deriving from the provisions of the Agreement for reciprocal protection on all AM broadcast frequencies, the problem remains of finding a suitable frequency on which the service heretofore provided by KFMB at San Diego may continue to be rendered to that community and adjacent areas. It is appropriate that use be made of the relatively uncluttered spectrum

[4115]

space still open on the Class I-A clear channels, and that provision be made in this proceeding -- which embraces the allocation questions pertaining to all Class I-A frequencies -- for a substituted assignment to San Diego. A painstakingly careful review of all the availabilities persuades us that 760 kc is the preferable choice, taking into account requirements of protection to Mexican stations on other Class I-A channels, the availabilities of some other Class I-A clear channels for new Class II-A stations at other places in the United States, domestic and Canadian co-channel and adjacent channel limitations on the allocation of individual Class I-A clear channels, and related considerations. We accordingly herein assign 760 kc for use for a Class II unlimited time operation at San Diego. Exceptionally, in this instance, we confine the assignment to a specific city instead of making it available generally throughout one or more states in conformity with the general pattern of clear channel reallocations adopted herein.

79. In reaching this decision, we have given consideration to all

comments relating to KFMB's request for shift to 760 kc or other frequency, and to possible alternative solutions. These include comments by Stations KFSD, San Diego, WJR, Detroit and other comments bearing on this problem. We note the interest of KFSD, a station operating at San Diego on 600 kc, in shifting to a Class I-A frequency if any should be made available. Parties interested in securing a Class II-A operation in California may apply for 1120 kc which is herein made available for application in California or Oregon. The interests of any other parties in the use of 760 kc at San Diego can, of course, be considered in connection with renewal of KFMB's license on that frequency. We are not, however, using 760 kc to solve the main issues of the clear channel proceeding but for this special limited purpose. Therefore, it will not be available under the criteria governing Class II-A stations but will be authorized to operate with 5 kw of power, the power presently used by KFMB on 540 kc. Finally, we recognize that an authorization under this rule will require waiver of Section 3.37 of our rules because of a 2 mv/m and 25 mv/m overlap with Station KBIG, Avalon, California (740 kc).

80. In like manner, we are reserving 750 kc, herein assigned to Alaska, for use at Anchorage by KFQD, which must vacate 730 kc under the terms of the Mexican Agreement. This special need results in the use of 750 kc in Alaska, rather than in Arizona as proposed by the Third Notice. Moreover, our careful search has disclosed no other frequency which, under the general allocation plan we adopt, could be allocated to Arizona. However, the comments received under the Third Notice show that 750 kc would have been "unworkable" in Arizona in any event. Use of 750 kc in Arizona is undesirable because it would present serious adjacent channel problems and the assignment could not be used in wide areas of the state. The necessity of avoiding interference to KUEQ (740 kc, Phoenix), coupled with its central location in Arizona, constitutes a formidable bar to the flexible use of the frequency within the state. Other substantially limiting factors to such assignment would be the necessity of protecting co-channel

[4116]

Station KMMJ, Grand Island, Nebraska, and an adjacent channel station (740 kc) at Cortez, Colorado. These stations would probably forever limit an Arizona station on 750 kc to a power of 10 kw and would seriously restrict its location. We note, in passing: that no specific proposals were received requesting 750 kc for Arizona. We have given the parties comments and proposals careful consideration and agree that 750 kc is not a desirable assignment for Arizona. Because of the special use made of 750 kc, it will not be governed by the criteria applying to Class II-A stations. Its use at Anchorage will be limited to 10 kw, the power presently used by Station KFQD on 730 kc.

81. We note with respect to both the Anchorage and San Diego assignments made herein on 750 kc and 760 kc, that neither serves the primary objective of the clear channel reallocations adopted in the appended rule amendments: i.e, the provision of primary service to white areas. Were it not for the special and compelling circumstances which justify the exceptional use of these frequencies as herein provided for, we would have preferred to allocate them for stations which would provide a first primary service in white areas. We nevertheless conclude, after a painstaking balancing of all pertinent considerations, that it is appropriate and desirable to make the exceptional provisions for 750 kc and 760 kc which we here adopt. As to both, we impose a requirement that they protect the 0.5 mv/m 50% skywave contour of the Class I-A station operating on the same channel. In addition, they will, of course, be required to meet the daytime protection standards presently contained in the Rules.

[4117]

KOB (770 kc)

82. The special circumstances relating to 770 kc and 1030 kc relate largely to the "KOB problem".<sup>9/</sup> In 1940, as in prior years, Stations WJZ, New York City (now WABC) WBZ, Boston, and KOB, Albuquerque,

operated as Class I stations on the clear channels 760 kc, 990 kc, and 1180 kc, respectively, Section 3.25 (a) of our Rules then providing that 760 kc and 990 kc were I-A clear channels, and 1180 kc was a I-B clear channel. Under the reallocations effected in late 1940 and early 1941 to implement the first North American Regional Broadcasting Agreement, all of these stations were required to change frequency. WABC (WJZ) was shifted to 770 kc, and under the rule amendments effective March 29, 1941, that frequency became a I-A clear channel. As part of the over-all reallocation (in which many stations were moved to higher frequencies) it was necessary to remove KOB from 1180 kc, and no frequency could be found on which that station could retain its I-B status. Accordingly, WBZ and KOB were both assigned to 1030 kc, WBZ as a Class I-B station and KOB as a Class II station, and began operation on this frequency March 29, 1941. The rule amendments effective the same date made 1030 kc a Class I-B frequency. Because of the limited service KOB could render on 1030 kc, efforts were made to find a frequency on which its service area would be larger. Accordingly, in October, 1941, KOB received a Special Service

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<sup>9/</sup> For a more complete history of this matter, see the Commission's decision in Albuquerque Broadcasting Company, Appendix A, 25 FCC 666, 724; 16 RR 765, 883 affirmed 280 F. 2d 631, 20 R.R. 2001 (1960).

## [4118]

Authorization to operate on 770 kc with 50 kw day and 25 kw night, non-directionally. Since October, 1941, KOB has operated on 770 kc, under a series of SSA's and most recently under temporary authority.<sup>10/</sup>

83. Early in 1944 KOB applied for modification of construction permit and license to operate on 770 kc with 50 kw power, unlimited time and non-directionally. It was the hearing proceeding on this application (Dockets 6584 and 6585) which ultimately resulted in our decision of September 1958 (25 FCC 683, 16 RR 765), in the "KOB case". This hearing, after an extensive inquiry into 10 possible modes of operation by KOB (4 on 770 kc and 6 on 1030 kc) resulted in a determination that the public interest would best be served by KOB and WABC both operating



on 770 kc as Class I stations, affording each other mutual protection by directionalizing their operations at night. The Commission accordingly amended its Rules to permit assignment of two Class I stations on 770 kc. Of great importance in reaching this conclusion was the fact that KOB would render a much larger nighttime primary service<sup>11/</sup> under this mode than under any other mode, as well as some secondary service, including secondary service to an area in the West which receives only two other secondary service and has no nighttime primary service (See 25 FCC 771-782, 16 RR 859-873). The decision took into account the loss of service from WABC which would be entail by requiring that station to directionalize (which would occur largely in the East, where service is substantially more abundant); and there was specific comparison of the mode finally selected with operation by KOB as a Class II station protecting WABC's present service. (See 25 FCC 778, 16 RR 866-867). The decision outlines various procedural steps designed to implement this conclusion; KOB, as permitted by the decision filed an amendment to its 770 kc application looking toward the operation decided upon. Pending action on this application, KOB continues to operate on 770 kc under its temporary authority, with 50 kw daytime and 25 kw, directionalized to protect WABC, at night. WABC has consistently opposed KOB's assignment to 770 kc, and in its presently pending application for renewal of license indicated that it does not acquiesce in our conclusion that its nighttime operation should be directionalized to afford KOB mutual Class I protection. Since the rule amendment is phrased in permissive rather than mandatory terms, WABC's renewal application is not technically in conflict with the amended rules. KSTP, Inc., the licensee of KOB, has filed an application for facilities on 770 kc at New York City, directionalized as set forth in our KOB decision, obviously in conflict with WABC's renewal application.

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<sup>10/</sup> In 1957, pursuant to an Order of the Commission following a mandate of the Court of Appeals for the District of Columbia, KOB's nighttime operation was directionalized so as to substantially protect WABC from



objectionable interference within that station's 0.5 mv/m 50% skywave contour, and it presently operates on that basis. However, KOB has continued to be licensed for operation on 1030 kc, presently holding a renewal of license until 1962 on that frequency, even though it does not operate thereon.

11/ Under this mode of operation KOB can provide a nighttime primary service to 156,275 persons who lack any such service from other stations as compared to only 37,483 persons who would be so benefitted if KOB should operate as a Class II station protecting WABC.

[4119]

84. ABC appealed our decision to the United States Court of appeals for the District of Columbia, which in May 1960 affirmed the Commission. (American Broadcasting Company v. FCC, 280 F. 2d. 631 20 R.R. 2001.) However, the Court added:

"At the same time, we do not think that the position of ABC as a network should be permanently prejudiced by forcing it to share a channel if other networks are given full use of clear channels. This inequity, if it exists or is permitted to exist, should be cognizable by the Commission in a proper proceeding brought before it by ABC, even though the assignment of KOB to 770 kc is permitted to continue. In other words, the Commission should seek to provide channel facilities to the ABC network on a basis which is fair and equitable in comparison with other networks. Whether this is to be done by permitting ABC to intervene in the clear channel proceedings now pending, or through some other means, is not for us to say. It may be that ABC can raise its claims in this regard by filing competitive applications when present licensees on other frequencies seek renewal or by seeking modification of existing licenses held by others. Perhaps the Commission will afford, sua sponte, some other procedural remedy. Thus, we do not believe that ABC has been or should be precluded from a hearing on its claim that the public interest requires that the loss of service in the East, which Class I broadcasting from Albuquerque produces, be absorbed by some eastern broadcaster other than WABC. Any failure by the Commission to give due consideration to ABC's claim for treatment comparable to that accorded to other networks, when raised in an appropriate manner, may be brought to the courts for review."

85. In view of the above language of the Court of Appeals and the need for further hearings concerning some or all of the three pending applications mentioned above, it is not appropriate here to determine finally the exact form of operations which will be permitted on the

channel 770 kc. However, we have in our deliberations herein reviewed the disposition to be made of all of the clear channels, including that frequency, and certain conclusions as to the "KOB problem" and 770 kc are required and appropriate at this point. These, which are discussed in more detail below, are as follows:

(a) For reasons stated at length in the KOB decision, and in line with our general conclusions reached herein concerning the need for using I-A channels to provide a first nighttime primary service in underserved areas, the public interest requires the establishment of a major unlimited time facility in New Mexico. This is particularly true in the unique "KOB case", where the area once had Class I service and was deprived of it because of the reallocations requires in 1941 in connection with the first NARBA.

[4120]

(b) The frequency 1030 kc, being greatly inferior to 770 kc for such operation for reasons stated in the KOB decision, can no longer be regarded as involved in the "KOB problem", and is available for other use. Its utilization is discussed below.

(c) The frequency 770 kc is the one most suitable and appropriate for such operation by KOB. We did not consider alternative frequencies other than 770 kc and 1030 kc in the KOB proceeding, and we should not and indeed cannot consider them further -- e.g., on the basis of an evidentiary record as requested by ABC -- either here or in whatever hearings may take place with respect to the 770 kc applications mentioned above.

(d) Whatever may be the ultimate decision as to operation by New York and Albuquerque stations on 770 kc, we conclude with respect to this channel, for the same reasons discussed above with respect to the I-A channels generally, that multiple breakdown thereof, with more than two stations operating at night, is not in the public interest at this time. Therefore pending applications for unlimited time operations by other stations on this frequency will be dismissed.

86. The only one of these points requiring further discussion is the selection of 770 kc as the frequency for the New Mexico unlimited time assignment, without further consideration of other frequencies on the basis of an evidentiary hearing as requested by ABC. This channel was selected in the KOB case as one of two for consideration, because of the historical association of that frequency with the "KOB problem". Of the two channels so studied, 770 was selected as greatly preferable to 1030 kc. The Court of Appeals affirmed our actions in both respects. Upon further examination of all of the channels, we find 770 kc to be the appropriate one for use in New Mexico. It must be borne in mind that the overall allocation scheme adopted herein was carefully worked out, as it had to be, to take into account the numerous problems involved in making the new assignments on the I-A channels -- protection of Canadian and Mexican stations, protection of our own co-channels and adjacent channel assignments, placing the new stations far enough from the co-channel Class I-A stations so that the former can render a reasonable amount of service, and avoidance wherever possible of having the new unlimited time stations in adjacent states on channels only 10 kc apart. The assignment of 770 kc for use in New Mexico meets these requirements, and permits the rendition of a large amount of much-needed service in that area. Our decision affirming that assignment is based upon what we deem best for the public with due regard for present and potential service in the standard broadcast medium. Whatever significance considerations relating to "networking" and network competition may have in other contexts -- a matter we do not decide here -- we cannot conclude that the public interest would be served by attempting to redesign the entire nationwide allocation of frequencies adopted here solely in order to alleviate whatever adverse

[4121]

situation may confront ABC in these respects. <sup>12/</sup> Consideration of this character, which are subject to frequent change, cannot be of great consequence in deciding wide-ranging, basic, and relatively permanent allocations questions such as those involved here.

87. For these reasons, ABC's request for evidentiary hearing on alternative frequencies for the New Mexico assignment must be denied. Moreover, it would make a complete travesty of our efforts to resolve the many and fundamental clear channel allocation problems, involving hundreds of stations all over the country, if we were to proceed to consider other alternative frequencies on the basis of an evidentiary record. As mentioned above, there is no one single obvious alternative. Even if limited to three as proposed by ABC, such an inquiry would obviously take a vast additional amount of time; and there is no reason why licensees of stations affected by inquiry into these frequencies could not suggest still further alternatives which we would be compelled to consider. While

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<sup>12/</sup> There is no one other frequency which could be considered as an obvious alternative to 770 kc for Class I use at Albuquerque, even aside from the other disposition of the various I-A channels made herein. Of the three proposed by ABC -- 660, 680, and 1180 kc -- 880 and 1180 kc would not provide as much needed primary service in the Southwest as does 770 kc. As to 660 kc, while this frequency might afford somewhat more of such service in the Southwest, this channel has long been used by Station KFAR, Fairbanks, Alaska, in addition to the Class I-A station at New York City. Such use we have concluded herein to be consistent with our allocation plan. Additional use at Albuquerque would raise slightly the nighttime limit to KFAR in Alaska, and thus prevent that station to some extent from rendering widespread and needed service.

[4122]

such a proceeding, doubtless of several years' duration, would be going on, not only would resolution of the "KOB problem" be delayed, but we could not proceed finally with any substantial reallocation of clear channels anywhere, because we would not know what frequency would finally be selected for this important use. A blanket "freeze" on a substantial portion of the broadcast spectrum, affecting many applications, would have to be maintained for the same indefinitely long period.

89. Whatever disposition is finally made as to operation on 770 kc, the use of this frequency will harmonize with uses herein made of Class I-A channels for the provision of much needed nighttime primary service in areas otherwise lacking it. The Class I-A channels formerly reserved for the exclusive nighttime use of a single station, on which we now permit two unlimited time stations, include all those occupied by network owned stations.

90. In view of the foregoing considerations, we here affirm our KOB decision insofar as it determined that a major unlimited time facility should be assigned to New Mexico on 770 kc and amended rules to permit the assignment of two Class I stations on that frequency.

KOA

91. Metropolitan Television Company, licensee of KOA, Denver, Colorado, admits that since the I-A channels, rather than the I-B channels, form the basis for our overall allocation plan, KOA is not directly affected. However, it urges that KOA be restored to Class I-A facilities. It does not suggest what to do with the 10 full-time stations now sharing its frequency. The KOA request goes beyond anything adopted herein and must be denied.

1030 kc

92. Since 1030 kc is no longer involved in the "KOB problem", we proposed in our Third Notice to permit a Class II unlimited time assignment on that frequency in Montana or Wyoming.<sup>13/</sup> That Notice also contemplated the use of 650 kc in Montana and 1180 kc in Wyoming. We have seen that 650 kc is not one of the frequencies on which duplication will now be permitted. As to 1030 kc and 1180 kc, further examination has revealed that by utilizing 1030 kc in Wyoming and 1180 kc in Montana greater protection can be afforded

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<sup>13/</sup> In view of KOB's operation on 770 kc, the fact that KOB has a license on 1030 kc is not an impediment to assignment of a new 1030 kc station elsewhere.



[4123]

to the I-A operation at Salt Lake City which provides the only I-A service to vast regions of Idaho, Utah, Wyoming, Nevada, Arizona, New Mexico and Colorado. The change involves only the Montana and Wyoming assignments and each of these states still receives one Class II-A assignment. No proposals were received pursuant to the Third Notice with respect to either of these frequencies. Moreover, assignment of 1030 to any portion of Wyoming and 1180 to any portion of Montana is not precluded by the location of the I-A stations on those channels.

93. Such use of 1030 kc is, of course, similar to that now adopted for those I-A channels on which duplication will be permitted. 1030 kc is now a I-B channel under our rules, though assigned to the United States for priority of use as a I-A channel under the 1950 North American Regional Broadcasting Agreement, and the 1957 Agreement between the United States of America and the United Mexican States Concerning Radio Broadcasting in the Standard Broadcast Band. The question is whether this frequency should be reclassified as a I-A channel in our rules. In the pending file (because of the "freeze")<sup>14/</sup> are some six applications for use of this frequency on an unlimited time Class II basis in the continental United States, none of which is for Wyoming. If 1030 kc becomes a I-A channel these applications, of course, cannot be granted under the rules we adopt herein as to the use of these channels.

94. We conclude that 1030 kc should be utilized by a Class II-A station in Wyoming and that it should be reclassified as a I-A channel. The reason why it was made a I-B channel in 1941 -- to afford an assignment for KOB in New Mexico -- no longer exists, and therefore it is appropriate to give this frequency the status accorded it under international agreements. It must be borne in mind that a I-A channel -- on which the United States or any other country having I-A priority is afforded protection to its borders rather than merely with respect to particular existing operations -- is a national asset. We should not suffer a loss by default of such an asset to which we are entitled under

international agreements. These considerations outweigh the restriction on unlimited time assignments which is entailed if 1030 kc is made a I-A channel. Moreover, the Class I-A assignment which is provided on that frequency is an integral part of the plan which we have adopted for achievement of the primary objective of improving service to white areas. We could not consider in any event the making of other unlimited time assignments which would impair the value of this new Class II-A allocation. The reclassification of 1030 kc is consistent with our decision mentioned above not to permit, for the present, use of the channels duplicated in this proceeding by more than one unlimited time Class II-A station. Accordingly, Section 3.25 of our rules is amended herein to make 1030 kc a I-A channel, and the pending applications for unlimited time operation thereon within the continental United States will be dismissed.

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<sup>14/</sup> Section 1.351 of our rules, the "freeze" rule, provided that, pending the decision in Docket No. 6741, action would be withheld on applications for facilities on the I-A channels and on 1030 kc and 14 other I-B channels.

[4124]

#### Denial of Educational Reservations

95. Comments pursuant to the Third Notice were filed by about 30 educational groups which requested that some or all of the proposed new Class II stations be reserved for educational use. Of this group, nine gave some indication that the commenting party itself is interested in obtaining the use of a clear channel frequency. One such party stated it has the necessary funds available to it.

96. The Commission has never reserved frequencies for educational use in the standard broadcast band. When television came to the fore as a new medium, we recognized the high costs of establishing a television station and the necessity, if educators were to be given sufficient opportunity to utilize the medium, that some channels be reserved for non-commercial use in the establishment of the Table of

Assignments to give the educational community time to evaluate the uses of the medium, and to raise the huge sums required for the construction and operation of stations. This decision was necessitated in part by the limited number of channels available.

97. In AM radio, however, the situation has been somewhat different. Construction costs are substantially less than they are for television stations. Radio as a medium has existed for many years and it is not necessary that educators be given time, as was required in the new medium of television, to study possible uses and the impact of the medium. We see no need in the public interest for the reservation requested. Our objective of securing nighttime primary service to areas which presently lack such service has been made clear. Detailed requirements that successful applicants for such stations must meet are enumerated herein. Moreover, as we noted in our Sixth Report and Order setting up the Table of Television Assignments, the potential of television for education is much greater and more readily apparent than that of aural broadcasting and that the interest of the educational community in the field is much greater than it was in aural broadcasting. Nothing we are adopting herein forecloses additional educational AM radio. Educational applications for the Class II-A stations hereby made available will be accepted on the same basis as are commercial applications. Those mutually exclusive applications complying with our Rules will be given comparative consideration.

#### The I-B Channels

98. In our consideration of the clear channel proceeding in recent years, we have not contemplated breakdown of the I-B channels any further than at present. Because of the relatively complicated conditions and requirements which already obtain on these channels and which would have to be taken into account in any new allocation plan -- requirements of protecting usually two co-channel United States I-B stations and a number of co-channel unlimited time United States Class II stations,

foreign protection requirements, the fact that the United States receives protection on these channels only with respect to existing operations and not to the borders of the country, and similar factors -- the Class I-B channels do not lend themselves to use in an overall allocation plan, and we must look primarily to the I-A channels for an allocation pattern designed to improve overall radio service.

99. Accordingly, we adopt herein no change in the established principles and standards governing the assignment of stations to Class I-B channels. Further, consistently with the changed mode of protecting future uses of Class I-A channels, we remove the blanket freeze hitherto applicable to 15 Class I-B channels and retain only the restrictions already discussed, which are adapted to and necessitated by our decisions concerning the utilization of the Class I-A channels.

#### Concluding Observations

100. This proceeding, which was initiated in 1945 on eleven issues of wide scope, and pursued further under subsequent Notices issued in 1958 and 1959, has embraced and encyclopedic variety of approaches and proposals going to the basic question of how best to utilize almost half the spectrum space devoted to standard broadcasting. While the sheer volume of the record and the fact that it has spanned a period of consequential change in standard broadcasting have added difficulty to the task of deciding upon the most desirable course, the Commission has been vastly assisted by numerous helpful contributions made in submissions on the record through testimony, exhibits, briefs, oral arguments, comments and other pleadings.

101. In the hard fought, head-on conflict between the two basic approaches of extending the reach of major stations on clear channels or increasing the numbers of stations permitted on these channels, much valuable data and analysis have been placed before us by the proponents of both approaches. Recognition is due to the fact that some merit attaches to very many of the proposals which have been urged upon us, including some of those which we herein reject. Our essential task in this proceeding has been to select among the myriad solutions

offered those which, on net balance, taking into account the many pertinent considerations, would best serve the public interest. The opposed factors bearing upon our judgments in some instances are closely balanced. While recognizing that much can be said for numerous alternative approaches, we now conclude that the course laid out herein, both as reflected in the rule changes now adopted and in the preservation for the time being of the status quo on 12 Class I-A clear channels, represents the best solution available at this time.

[4126]

102. Authority for adoption of the rule amendments herein is contained in Sections 4(i) and (j), 303(a), (b), (c), (d), (f), (g), (h), and (r), and 307(b) of the Communications Act of 1934, as amended.

103. In view of the foregoing, IT IS ORDERED That, effective October 30, 1961, the Commission's Rules ARE AMENDED as set forth in the Appendix hereto; and

104. IT IS FURTHER ORDERED, That all pleadings, petitions, comments and reply comments, requesting other changes in our rules relating to clear channels; requesting that no changes be made; requesting further hearing, oral argument, or evidentiary hearing; or requesting other relief not adopted herein ARE DENIED; and

105. IT IS FURTHER ORDERED, That this proceeding, Docket No. 6741, IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION\*

Ben F. Waple  
Acting Secretary

Adopted: September 13, 1961

Released: September 14, 1961

\* See attached Dissenting Statement of Commissioner Lee;  
See attached Statement of Commissioner Cross Concurring in Part  
and Dissenting in Part

NOTE: Amendment of Part 1 herein will be covered by Transmittal Sheet I-13; amendment of Part 3 will be included in a revised edition of Volume III being prepared.

[4127]

APPENDIX

## PART I

1. Section 1.351 is amended to read as follows:

§ 1.351. Applications for frequencies adjacent to Class I-A channels.

Notwithstanding the provisions of any other rules of the Commission, all applications (regardless of when they were or may be filed) for frequencies located within 30 kc of a Class I-A channel listed in § 3.25(a) of this chapter will be subject to the provisions of this section. The provisions of paragraph (a) of this section apply to the frequencies listed therein, which are within 30 kc of a Class I-A channel on which an unlimited time Class II assignment is specifically provided for in § 3.22 or 3.25(a) of this chapter. The provisions of paragraphs (b) and (c) of this section apply to the frequencies listed in paragraph (b), which are within 30 kc of the remaining Class I-A channels. Where a frequency is listed both in paragraphs (a) and (b), applications for facilities on such frequency are subject to the provisions and restrictions contained in both of said paragraphs.

(a)(1) The provisions of this paragraph apply to the following frequencies:

680, 690, 710, 730, 740, 790, 800, 810, 850, 860, 900, 910, 920,  
990, 1000, 1010, 1050, 1060, 1070, 1080, 1090, 1110, 1130, 1140,  
1150, 1170, 1190, 1220, 1230 and 1240 kc.

(2) Where it appears that the facilities requested in any application for one of the designated frequencies (other than an application by an existing Class IV station to increase daytime power on 1230 or 1240 kc) involves undue risk of objectionable interference to, prohibitive interference from, or prohibited overlap with, a possible new Class II-A assignment specified in § 3.22 of this chapter or a new unlimited time Class II assignment at Anchorage, Alaska, or San Diego, California, specified in § 3.25(a) of this chapter, such application will not be granted until the location and operating facilities of such new Class II station



are established. Assignments of such new Class II stations will be made without regard to the pendency of applications on adjacent frequencies. Any hearing which may be held on such an application for an adjacent frequency will not be comparative with respect to the Class II facility, and any issues pertaining to the mutual impact of the Class II and adjacent channel operations concerned will be confined to the question of whether, with a Class II station operating as proposed, the public interest would be served by a grant of the adjacent channel application.

(b)(1) Until Sept. 1, 1964, or such earlier date as may be announced the provisions of this paragraph and of paragraph (c) of this section will apply to all applications for the following frequencies:

610, 620, 630, 680, 690, 710, 730, 790, 800, 810, 850, 860, 900, 1010, 1050, 1060, 1070, 1130, 1140, 1150, 1170, 1190 and 1220 kc.

## [4128]

(2) Applications for new stations on, or for change of existing stations to, one of the designated frequencies will not be granted, and, except as provided in paragraph (c) of this section, will be placed in the pending file without further processing or consideration. Where before October 30, 1961, such applications had attained protected status under § 1.354 or by designation for hearing, they will retain such status to the extent so established. Additionally, such applications will be protected, as provided elsewhere in the rules, through designation for hearing. They will not be otherwise protected.

(3) Applications for increase in power or operation during nighttime hours not previously authorized will be processed in normal course, but will be considered in the light of the effect that grant thereof might have upon possible future uses of the Class I-A channel or channels located within 30 kc of the frequency involved (e.g., authorization of power greater than 50 kw for Class I-A stations, or additional unlimited time co-channel assignments). Such applications will not be granted

if it appears that they risk prejudice to such possible future uses of the Class I-A channels concerned, because of interference caused or received, or prohibited overlap. In these situations the application involved, if otherwise ready for grant (after hearing or otherwise) will be placed in the pending file. Where it appears that because of these considerations an application cannot be granted in due course, the applicant will be so notified and, notwithstanding the provisions of § 1.311 and 1.354, will be permitted to amend his application within 45 days of such notice, without change in position in hearing or on the processing line, in order to remove the circumstances which stand in the way of a grant. Applications will acquire and retain protected status as they would in normal course.

(4) Applications for other changes in facilities on the designated frequencies will be processed and acted upon in normal course.

(5) Action will not be withheld under this paragraph on applications for facilities in Alaska, Hawaii, Puerto Rico, or the Virgin Islands.

(c)(1) After October 30, 1961, hearings will not be designated on applications falling under paragraph (b)(2) unless they conflict with applications not falling under paragraph (b)(2).

(2) If the decision in a hearing looks toward grant of an application which, under paragraph (b)(2) or (b)(3), cannot be made immediately, such application and all applications conflicting with it will be placed in the pending file, and will retain protected status.

[4129]

2. In § 1.354, paragraphs (a) and (c) are amended, paragraphs (d) through (j), inclusive, are redesignated paragraphs (f) through (1), inclusive, and new paragraphs (d) and (e) are added, as follows:

§ 1.354 Processing of standard broadcast applications.

(a) Applications for standard broadcast facilities are divided into three groups.

(1) In the first group are applications for new stations (except applications for new Class II-A stations) or for major changes in the fac-

ilities of authorized stations, i.e., any change in frequency, power, hours of operation, or station location: Provided, however, That the Commission may, within 15 days after the tender for filing of any application for other modification of facilities, advise the applicant that such application is considered to be one for a major change and therefore is subject to the provisions of § 1.359.

(2) The second group consists of applications for licenses and all other changes in the facilities of authorized stations.

(3) The third group consists of applications for new Class II-A stations.

\* \* \* \* \*

(c) Applications for new stations (except new Class II-A stations) or for major changes in the facilities of authorized stations are processed as nearly as possible in the order in which they are filed. Such applications will be placed in the processing line in numerical sequence, and are drawn by the staff for study, the lowest file number first. Thus, the file number determines the order in which the staff's work is begun on a particular application. There are two exceptions thereto: the Broadcast Bureau is authorized to (1) group together for processing applications which involve interference conflicts where it appears that the applications must be designated for hearing in a consolidated proceeding; and (2) to group together for processing and simultaneous consideration, without designation for hearing, all applications filed by existing Class IV stations requesting an increase in daytime power which involve interlinking interference problems only, regardless of their respective dates of filing. In order that those applications which are entitled to be grouped for processing may be fixed prior to the time processing of the earliest filed application is begun, the Commission will periodically publish in the Federal Register a Public Notice listing applications which are near the top of the processing line and announcing a date (not less than 30 days after publication) on which the listed applications will be considered available and ready for processing and by

which all applications excepting those specified in exception (2) in this paragraph must be filed if they are to be grouped with any of the listed applications.

## [4130]

(d) Applications for new Class II-A stations are placed at the head of the processing line and processed as quickly as possible. Action on such applications may be at any time: (1) more than 30 days after public notice is given of acceptance of the application for filing, or (2) after January 30, 1962, whichever is later.

(e) The processing and consideration of applications for new stations or major changes on those frequencies specified in § 1.351 are subject to certain restrictions, as set forth therein.

## PART 3

3. Section 3.21 is amended to read as follows:

§ 3.21 Classes of standard broadcast channels and stations.

(a) Clear channel. A clear channel is one on which the dominant station or stations render service over wide areas, and which are cleared of objectionable interference within their primary service areas and over all or a substantial portion of their secondary service areas. Stations operating on these channels are classified as follows:

(1) Class I station. A Class I station is a dominant station operating on a clear channel and designed to render primary and secondary service over an extended area and at relatively long distances. Its primary service area is free from objectionable interference from other stations on the same and adjacent channels, and its secondary service area free from interference except from stations on adjacent channels, and from stations on the same channel in accordance with the channel designation in §§ 3.25 or 3.182. The operating power shall not be less than 10 kilowatts nor more than 50 kilowatts. (Also see § 3.25(a) for further power limitation.)

(2) Class II station. A Class II station is a secondary station which operates on a clear channel (see § 3.25) and is designed to render service

over a primary service area which is limited by and subject to such interference as may be received from Class I stations. Whenever necessary a Class II station shall use a directional antenna or other means to avoid interference with Class I stations and with other Class II stations, in accordance with § 3.182 (and § 3.22 in the case of Class II-A stations). Class II stations are divided into three groups:

(i) Class II-A station. A Class II-A station is an unlimited time Class II station operating on one of the clear channels listed in § 3.22 and assigned to a community within a state specified in the Table contained in that section. A Class II-A station shall operate with power of not less than 10 kilowatts nighttime nor more than 50 kilowatts at any time.

## [4131]

(ii) Class II-B station. A Class II-B station is an unlimited time Class II station other than those included in Class II-A. A Class II-B station shall operate with power not less than 0.25 kilowatts nor more than 50 kilowatts.

Note: The Class II station operating unlimited time on 760 kc at San Diego, California, shall be limited to a power of 5 kw and the Class II station operating unlimited time on 750 kc at Anchorage, Alaska shall be limited to a power of 10 kw. Both stations shall protect the I-A station on the same frequency to its 0.5 mv/m 50% skywave contour.

(iii) Class II-D station. A Class II-D station is a Class II station operating daytime or limited time. A Class II-D station shall operate with power not less than 0.25 kilowatts nor more than 50 kilowatts.

(b) Regional channel. A regional channel is one on which several stations may operate with powers not in excess of 5 kilowatts. The primary service area of a station operating on any such channel may be limited to a given field intensity contour as a consequence of interference.

(1) Class III station. A Class III station is a station which operates on a regional channel and is designed to render service primarily to a

principal center of population and the rural area contiguous thereto. Class III stations are subdivided into two classes.

(i) Class III-A station. A Class III-A station is a Class III station which operates with power not less than 1 kilowatt nor more than 5 kilowatts and the service area of which is subject to interference in accordance with § 3.182.

(ii) Class III-B station. A Class III-B station is a Class III station which operates with power not less than 0.5 kilowatt, nor more than 1 kilowatt night and 5 kilowatts daytime, and the service area of which is subject to interference in accordance with § 3.182.

(c) Local channel. A local channel is one on which several stations operate with powers no greater than provided in this paragraph. The primary service area of a station operating on any such channel may be limited to a given field intensity contour as a consequence of interference. Such stations operate with power no greater than 250 watts nighttime, and power daytime no greater than:

(1) 250 watts if the station is located 100 kilometers (62 miles) or closer to the Mexican border, or in the area of the state of Florida south of 28 degrees north latitude and between 80 and 82 degrees west longitude; or

(2) 1 kilowatt if the station is located elsewhere.

[4132]

(3) Class IV station. A Class IV station is a station operating on a local channel and designed to render service primarily to a city or town and the suburban and rural areas contiguous thereto. The power of a station of this class shall not be less than 0.1 kilowatt, and not more than 0.25 kilowatt nighttime and 1 kilowatt daytime, and its service area is subject to interference in accordance with § 3.182.

Note 1: Under NARBA, the power ceiling for Class IV stations is 250 watts daytime as well as nighttime. The US-Mexican Agreement permits such stations to operate with up to 1 kilowatt power



daytime if they are located further than 100 kilometers (62 miles) from the Mexican border. Pursuant to the US-Mexican Agreement and informal coordination with the other NARBA signatories, the Commission will consider applications for Class IV stations on local channels with daytime powers more than 250 watts, up to 1 kilowatt, if such station is to be located outside of the areas specified in paragraph (c) (1) of this section, and if no objectionable interference would be caused (under the standards set forth in the pertinent international agreement) to a duly notified station in Mexico, Haiti, or any foreign county signatory to NARBA.

Note 2: All authorizations of new or changed Class I-B, Class II-B, Class II-D, Class III or Class IV facilities after October 30, 1961, are subject to whatever interference may be received from, or whatever overlap of 2.0 mv/m and 25 mv/m groundwave contours or overlap of 25 mv/m groundwave contours may be involved with, previously or subsequently authorized Class II-A facilities.

4. Section 3.22 is amended to read as follows:

§ 3.22 Assignment of Class II-A stations

(a) Table of assignments

One Class II-A station may be assigned on each channel listed in the following table within the designated state or states:

Channel (kc)	Existing Class I Station		State(s) in which Class II-A Assignment may be Applied for
670	WMAQ	Chicago	Idaho
720	WGN	Chicago	Nevada or Idaho
780	WBBM	Chicago	Nevada
880	WCBS	New York	North Dakota South Dakota or Nebraska
890	WLS	Chicago	Utah
1020	KDKA	Pittsburgh	New Mexico
1030	WBZ	Boston	Wyoming
1100	KYW	Cleveland	Colorado
1120	KMOX	St. Louis	California or Oregon
1180	WHAM	Rochester	Montana
1210	WCAU	Philadelphia	Kansas, Nebraska or Oklahoma

(b) Minimum service to "white" areas.

No Class II-A station shall be assigned unless at least 25% of its nighttime interference-free service area or at least 25% of the population residing therein receives no other interference-free nighttime primary service.

(c) Power. Class II-A stations shall operate with not less than 10 kw power nighttime.

(d) Protection. (1) Protection by Class II-A stations to other stations. The co-channel Class I-A station shall be protected by the Class II-A station to its 0.1 mv/m contour daytime and its 0.5 mv/m 50% skywave contour nighttime. All other stations of any class authorized on or before Oct. 30, 1961, shall normally receive protection from objectionable interference from Class II-A stations as provided in § 3.182.

(2) Protection to Class II-A stations. A Class II-A station shall normally receive daytime protection to its 0.5 mv/m groundwave contour and nighttime protection to the contour to which it is limited by the co-channel Class I-A station.

(e) Applications not complying with this section. Applications for Class II-A stations which do not meet the requirements of paragraphs (b) and (c) of this section will be returned without further consideration.

## [4134]

5. In § 3.24, paragraph (b) is amended; present paragraph (i) is redesignated paragraph (j); and new paragraph (i) is added; as follows:

§ 3.24 Broadcast facilities; showing required.

\* \* \* \* \*

(b) That objectionable interference will not be caused to existing stations or that if interference will be caused, the need for the proposed service outweighs the need for the service which will be lost by reason of such interference. (For special provisions concerning interference from Class II-A stations to stations of other classes authorized after October 30, 1961, see Note 2 to § 3.21 and § 3.22(d)). That the proposed station will not suffer interference to such an extent that its service would be reduced to an unsatisfactory degree. (For determining objectionable interference, see § § 3.182 and 3.186.)

\* \* \* \* \*

(i) That, in the case of an application for a Class II-A station (see § 3.22), 25% or more of the area or population within the nighttime interference-free service contour of the proposed station receives no nighttime interference-free primary service from another station.

6. In § 3.25, paragraphs (a) and (b) are amended to read as follows:

§ 3.25 Clear channels; Classes I and II stations.

\* \* \* \* \*

(a) On each of the following channels, one Class I station will be assigned, operating with power of 50 kw: 640, 650, 660, 670, 700, 720, 750, 760, 780, 820, 830, 840, 870, 880, 890, 1020, 1030, 1040, 1100, 1120, 1160, 1180, 1200 and 1210 kc. In addition, on the channels listed in this paragraph, Class II stations may be assigned as follows:

[4135]

(1) On 670, 720, 780, 880, 890, 1020, 1030, 1100, 1120, 1180 and 1210 kc, one Class II-A unlimited time station, assigned and located pursuant to the provisions of § 3.22.

(2) On the channel 750 kc, an unlimited time Class II station located at Anchorage, Alaska.

(3) On the channel 760 kc, an unlimited time Class II station located at San Diego, California.

(4) On any of the channels listed in this paragraph (to the extent consistent with the assignments provided in subparagraphs (1), (2), and (3) of this paragraph), unlimited time Class II stations located in Alaska, Hawaii, Virgin Islands, or Puerto Rico, which will not deliver more than 5 microvolts per meter groundwave day or night or 25 microvolts per meter 10 percent time skywave at night at any point within the continental limits of the United States excluding Alaska.

(5) On any of the channels listed in this paragraph (to the extent consistent with the Class I, Class II-A, and Anchorage and San Diego Class II assignments provided in this paragraph, and, in the case of limited time stations, subject to the restrictions contained in § 3.38), limited time and daytime only stations, as follows:

(i) In Alaska, Hawaii, Puerto Rico and Virgin Islands.

(ii) Within the continental United States excluding Alaska, where the station would operate with facilities authorized as of October 30, 1961.

Note 1: In view of special circumstances arising from the provision of pre-sunrise broadcast service on 640 kc at Ames, Iowa, applications will be accepted for broadcast operations on 640 kc between 6:00 a.m. central standard time and local sunrise at Ames, Iowa, with not to exceed 1 kw power: Provided, That such applications will be acted upon only after and in light of the decision reached in Docket No. 11290.

Note 2: In view of special circumstances arising from the provision of a service during some nighttime hours by a Class II station

operating on 830 kc at New York, N. Y., (i.e. from 6:00 a.m. to local sunrise and from sunset at Minneapolis to 10:00 p.m. E.S.T.) applications will be accepted for such operation: Provided, That they will be acted upon only after and in light of the decision reached in Docket No. 11227.

Note 3: On the frequency 770 kc, two Class I stations may be assigned.

Note 4: See NARBA concerning priority for Canadian Class I-B and Cuban Class I-C assignments on 640 kc.

## [4136]

Note 5: See NARBA concerning Cuban Class II-E assignments on 660, 670, 760, 780, 830, 1020, 1030, and 1120 kc.

Note 6: See US-Mexican Agreement concerning Mexican use of 660, 760, and 830 kc.

(b) To each of the following channels there may be assigned Class I and Class II stations: 680, 710, 810, 850, 940, 1000, 1060, 1070, 1080, 1090, 1110, 1130, 1140, 1170, 1190, 1500, 1510, 1520, 1530, 1540, 1550, and 1560 kilocycles.

Note 1: See NARBA and the US-Mexican Agreement concerning a Cuban Class II-E assignment on, and Mexican use of, 1030 kc.

Note 2: Class I and Class II stations on 1540 kc shall deliver not over 5 microvolts per meter groundwave or 25 microvolts per meter 10 percent time skywave at any point of land in the Bahama Islands, and such stations operating nighttime (i.e., sunset to sunrise at the location of the Class II station) shall be located not less than 650 miles from the nearest point of land in the Bahama Islands.

7. Section 3.28(a) is amended to read as follows:

§ 3.28 Assignment of stations to channels.

(a) The individual assignments of stations to channels which may cause interference to other United States stations only, shall be made in accordance with the provisions of this part for the respective classes

of stations involved. (For determining objectionable interference, see §§ 3.22, 3.182, and 3.186.)

8. In § 3.182, the introductory text and subparagraphs (1)(i) and (2) of paragraph (a) are amended; paragraph (c) is added; and paragraphs (s) (t) and (v) are amended, as follows:

§ 3.182 Engineering standards of allocation.

(a) Sections 3.21 to 3.34, inclusive, govern allocation of facilities in the standard broadcast band of 535 to 1605 kc. § 3.21 establishes three classes of channels in this band, namely, clear channels for the use of high-powered stations, regional channels for the use of medium-powered stations, and local channels for the use of low-powered stations. The classes and power of standard broadcast stations which will be assigned to the various channels are set forth in § 3.21. The classification of the standard broadcast stations are as follows:

(1) \* \* \*

[4137]

(i) The Class I stations in Group I-A are those assigned to the channels allocated by § 3.25(a), on which, except to the extent provided by that section and by § 3.22, duplicate nighttime operation is not permitted. The power of these stations shall not be less than 50 kilowatts. The Class I stations in this group are afforded protection as follows:

Daytime: to the 0.1 mv/m groundwave contour from stations on the same channel, and to the 0.5 mv/m groundwave contour from stations on adjacent channels.

Nighttime: to the 0.5 mv/m, 50% skywave contour from stations on the same channel, and to the 0.5 mv/m groundwave contour from stations on adjacent channels.

\* \* \* \* \*

(2) Class II stations are secondary stations which operate on clear channels with powers not less than 0.25 kw nor more than 50 kw, except that Class II-A stations shall not operate nighttime with less than 10 kw.



Class II stations are required to use a directional antenna or other means to avoid causing interference within the normally protected service areas of Class I stations or other Class II stations (for special rules and standards concerning Class II-A stations, see § 3.22). These stations normally render primary service only, the area of which depends on the geographical location, power, and frequency. This may be relatively large but is limited by and subject to such interference as may be received from Class I stations. However, it is recommended that Class II stations be so located that the interference received from other stations will not limit the service area to greater than the 2.5 mv/m groundwave contour nighttime and 0.5 mv/m groundwave contour daytime, which are the values for the mutual protection of this class of stations with other stations of the same class (except that Class II-A stations are normally protected to their 0.5 mv/m groundwave contour daytime, and nighttime to the limit imposed by the co-channel Class I-A station).

\* \* \* \* \*

## [4138]

(s) The existence or absence of objectionable groundwave interference from stations on the same or adjacent channels shall be determined by actual measurements made according to the method herein-after described, or, in the absence of such measurements, by reference to the propagation curves of § 3.184. The existence or absence of objectionable interference due to skywave propagation shall be determined by reference to the appropriate propagation curves in Figure 1 or Figure 1a or Figure 2 of § 3.190.

(t) In computing the fifty (50) percent and the ten (10) percent skywave field intensity values of a station operating on a clear channel specified in § 3.25 (a), use shall be made of the appropriate curve set forth in Figure 1a of § 3.190, "Skywave Signals for 10% and 50% of the Time." In computing the fifty (50) percent and ten (10) percent skywave field intensity values of a station operating on a clear channel specified in § 3.25 (b), use shall be made of the appropriate curve set forth in Figure 1 of § 3.190, entitled "Average Skywave Field Intensity (corresponding to the second hour after sunset at the recording station)." In computing the ten (10) percent skywave field intensity values of a regional channel station, use shall be made of the appropriate curve in Figure 2 of § 3.190, entitled "10 percent Skywave Signal Range." The curves in Figure 1 of § 3.190 are drawn for a radiated field of 100 mv/m at one mile in the horizontal plane from a 0.311 wavelength antenna. The curves in Figure 1a and Figure 2 of § 3.190 are drawn for a radiated field of 100 mv/m at one mile at the vertical angle pertinent to transmission by one reflection. In computations based on Figure 1, the pertinent vertical angle shall be determined by use of Figure 6 of § 3.190. In computations based on Figures 1a or 2 of § 3.190, the pertinent vertical angle shall be determined by use of Figure 6a of § 3.190.

\* \* \* \* \*

(v) Protected service contours and permissible interference signals for broadcast stations are as follows (for Class I and Class II-A stations, see § 3.182 (a)):

1006  
[4139]

Class of station	Class of channel used	Permissible power	Signal intensity contour of area protected from objectionable interference <sup>1/</sup>		Permissible interfering signal on same channel <sup>2/</sup>	
			Day <sup>3/</sup>	Night	Day <sup>3/</sup>	Night <sup>4/</sup>
I-A -----	Clear -----	50Kw -----	SC 100 uv/m ----- AC 500 uv/m -----	SC 500 uv/m (50% skywave) <sup>7/</sup> AC 500 uv/m <sup>3/</sup> -----	5 uv/m	25 uv/m <sup>7/</sup>
I-B -----	Clear -----	10 kw to 50 kw -----	SC 100 uv/m ----- AC 500 uv/m -----	SC 500 uv/m (50% skywave) AC 500 uv/m <sup>3/</sup> -----	5 uv/m	25 uv/m
II-A -----	Clear -----	0.25 kw to 50 kw (daytime) 10 kw to 50 kw (nighttime) -----	500 uv/m ----- 500 uv/m ----- 500 uv/m -----	500 uv/m <sup>3/</sup> ----- 2500 uv/m <sup>3/</sup> <sup>5/</sup> 2500 uv/m <sup>3/</sup>	25 uv/m- 25 uv/m- 25 uv/m-	25 uv/m- 125 uv/m- 125 uv/m-
II-B and II-D --	Clear -----	0.25 kw to 50 kw -	500 uv/m -----	500 uv/m <sup>3/</sup>	25 uv/m-	25 uv/m
III-A -----	Regional -----	1 kw to 5 kw -----	500 uv/m -----	4000 uv/m <sup>3/</sup>	25 uv/m-	200 uv/m
III-B -----	Regional -----	0.5 to 1 kw night and 5 kw day. -----	500 uv/m -----	Not prescribed <sup>6/</sup>	25 uv/m-	Not prescribed <sup>6/</sup>
IV -----	Local -----	0.1 to 0.25 kw night and 0.1 to 1 kw day	500 uv/m -----			

<sup>1/</sup> When a station is already limited by interference from other stations to a contour of higher value than that normally protected for its class, this contour shall be the established standard for such station with respect to interference from all other stations.

<sup>2/</sup> For adjacent channel, see paragraph (w) of this section.

<sup>3/</sup> Groundwave.

<sup>4/</sup> Skywave field intensity for 10 percent or more of the time.

1007

[4139]

5/ These values are with respect to interference from all stations except Class I-B, which stations may cause interference to a field intensity contour of higher value. However, it is recommended that Class II stations be so located that the interference received from Class I-B stations will not exceed these values. If the Class II stations are limited by Class I-B stations to higher values, then such values shall be the established standard with respect to protection from all other stations.

[4140]

6/ See paragraph (a) (4) of this section.

7/ Class I-A stations on channels reserved for the exclusive use of one station during nighttime hours are protected, from co-channel interference on that basis. On the frequency 770 kc, two Class I stations may be assigned.

SC - Same channel.      AC - Adjacent channel.

9. In § 3.185, paragraph (b), and the introductory text of paragraph (d) are amended, and new paragraph (k) is added, as follows:

§ 3.185 Computation of interfering signal from a directional antenna.

\* \* \* \* \*

(b) For signals from stations operating on Class I-B clear channels (those specified in § 3.25(b), in case of determining skywave interference from an antenna with a vertical pattern different from that on which Figure 1 of § 3.190 is predicated (the basis of the night mileage separation tables), it is necessary to compare the appropriate vectors in the vertical plane.

\* \* \* \* \*

(d) Examples of the use of skywave curves on Class I-B clear channels:

\* \* \* \* \*

(k) For signals from stations operating on Class I-A clear channels (those specified in § 3.25(a)), skywave interference is determined by using the 10% curve of Figure 1a of § 3.190, entitled "Skywave Signals for 10% and 50% of the Time." The pertinent angle of departure is to be determined by use of Figure 6a of § 3.190, in a manner similar to that described in paragraph (g) of this section for regional stations. An example of the determination of skywave interference in this situation is as follows: Assume a Class I-A station and a proposed Class II-A station, operating on the same channel, are separated 1450 miles and

that the 0.5 mv/m - 50% skywave contour of the Class I-A station is located 740 miles from the station. The distance from the Class II-A station to the protected contour of the Class I-A station is 710 miles and from Figure 6a the critical angles of radiation are  $5^{\circ}$  to  $9^{\circ}$ . If the vertical pattern of the antenna of the proposed Class II-A station is such that between these angles the maximum radiation is 34 mv/m at one mile, the value of the 10% field as read from Figure 1a is multiplied by 34/100 to determine the interfering 10% field intensity at the 0.5 mv/m - 50% skywave contour of the I-A station, which would be 0.025 mv/m.

10. Section 3.190 is revised by adding new Figure 1a, and modifying the legend to the title on Figure 6a, and amending the text to read as follows:

**§ 3.190 Engineering Charts.**

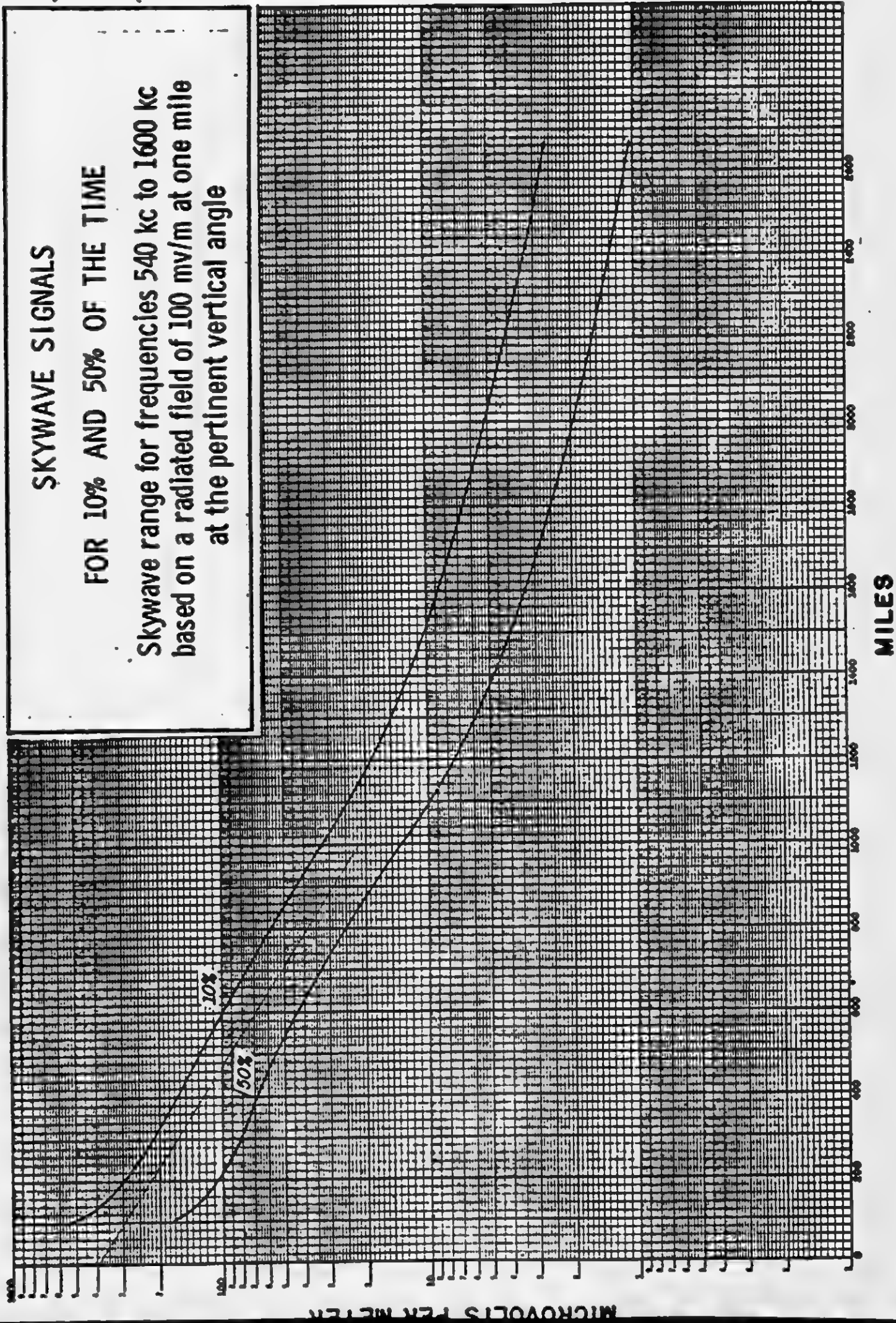
This section consists of the following Figures: 1, 1a, 2, R3, 5, 6, 6a, 7, 8, 9, 10, and 11.



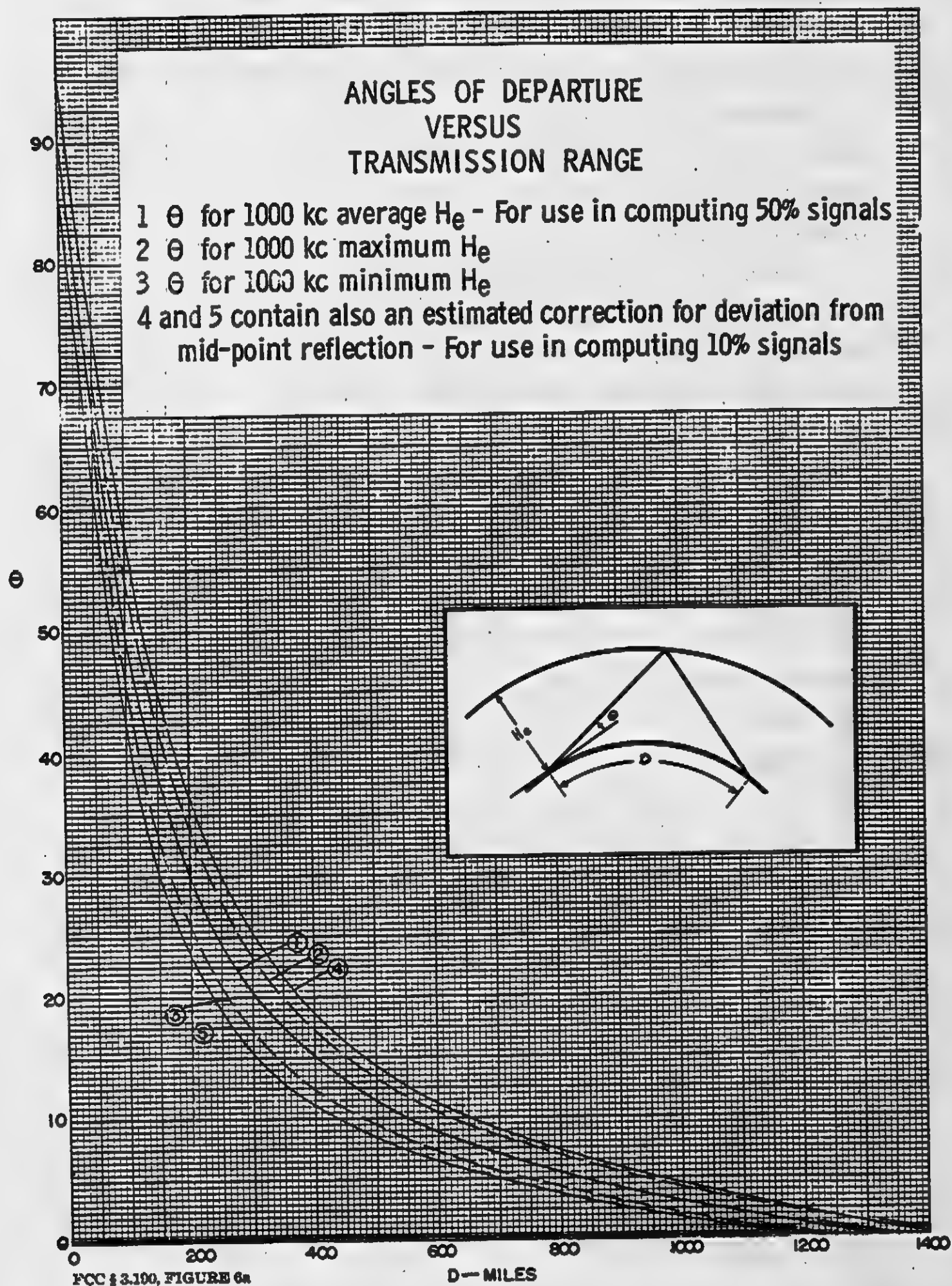
# SKYWAVE SIGNALS

FOR 10% AND 50% OF THE TIME

Skywave range for frequencies 540 kc to 1600 kc  
based on a radiated field of 100 mv/m at one mile  
at the pertinent vertical angle



FCC § 3.190 Figure 1a



DISSENTING STATEMENT OF COMMISSIONER ROBERT E. LEE  
(Docket No. 6741)

I dissent to the decision adopted by the majority in this proceeding.

After sixteen years of spasmodic consideration it has now been decided to cut the baby in half by breaking down half of the clear channels and by putting aside a consideration of greater power for Class IA stations to an indefinite date.

The majority states that it has given "due recognition" to a resolution passed by the United States Senate in 1938, which resolution was intended to inhibit our freedom to permit Class IA stations to operate with powers greater than 50 kw. I submit that a resolution passed twenty-three years ago, by members no longer in the Senate should not be given the effect of law, particularly since no other country in the world places such a restriction on station operating power. To penalize the American public by depriving it of more reliable radio service is, to my mind, highly unwarranted. It is to be noted that the majority is postponing consideration of this matter with the hope that it will be settled by 1964. Since the Commission finds it appropriate to give "due recognition" to the Senate resolution today, I find it difficult to expect that the resolution will not be accorded the same recognition in the future.

I formally proposed, to my fellow Commissioners, a plan for settlement of this proceeding, which proposal was rejected. My plan, while being in the nature of a compromise between the private interests of the parties in the proceeding, did not take on the aspects of a compromise of the public interest as does the majority's decision.

I proposed that the rules be amended to permit each Class IA station to increase power up to 750 kw and that these stations be given a period of one year to file appropriate applications. I proposed that at the end of the year period each channel be duplicated by the assignment of unlimited time Class II stations which would protect either

the Class IA stations' 50 kw secondary service area or, in the alternative, the secondary service area resulting from their newly authorized or proposed secondary service with increased powers.

By following this course I believe that a substantial improvement in secondary service could be accomplished and that new Class II facilities could be authorized in deserving areas without the undue administrative procedures adopted herein. This solution appears to me to offer the most substantive improvement in standard broadcast service with a minimum of gimmicks and causes for delay.

Permit me to analyze what the majority's decision accomplishes in the light of the objectives of the proceeding. The purpose of the hearing has been to bring more and better radio service to vast areas which are without a dependable service. It is estimated that one-half of the total land area of the United States (excluding Hawaii and Alaska), consisting of 3.5 million square miles, is without nighttime primary service. How does the majority intend to remedy the situation? It is going to impose a freeze on 53 channels to permit the expedited consideration of 11 prospective applications for special Class II A stations, each one being so highly limited by interference that it can be expected to render nighttime primary service to but scant populations. Evidence in this record indicates that a total of approximately 50 thousand square miles will be the recipient of this new service.

[4145]

Since the decision requires that at least 25% of the areas (to be served by prospective Class II A stations) be without primary service, it can be expected that with full implementation of the plan 12.5 thousand square miles which are not now receiving ground wave service would receive such service. This presumes that there would be applicants willing to build 10 kw stations employing expensive directional antennas serving remote and not too remunerative areas. I submit that the Commission's offer of special processing rules to bring new service to less than one percent of the area in the United States which is with-



out such service is hardly the decision the country has been waiting for the last 16 years. Had the Commission deliberately swept the Clear Channel proceeding under the rug, it could not have done so more effectively.

The majority's method of determining which channel is to be duplicated and which channel is to remain in status quo for further consideration is strained. As an example, 1120 kc is to be duplicated and not considered for higher power because of adjacent channel interference considerations. The Commission has no standards for skywave interference to adjacent channel skywave service, yet adjacent channel interference is the precise reason given for failure to consider Station KMOX, St. Louis, for higher power. On the other hand, the majority is willing to consider 700 kc eligible for higher power while the frequencies on either side of 700 kc are virtually saturated with stations that operate at night. This inconsistency is not explained. Moreover, the majority declines to put a Class II A station on 660 kc because of possible interference to a station in Alaska. In this day of directional antennas, this reason, like others given for the manner of disposition of the clear channels, is of little or no substance. The Alaska station is entitled to no greater protection than any other Class II station. But fundamentally I consider it inappropriate to pick and choose between the IA stations on a quasi-engineering basis. Each Class IA station could employ greater power and by the use of directional antennas protect all foreign stations as required by treaty obligations.

My proposal to permit Class IA stations to increase powers to 750 kw would eliminate daytime "white areas" and would increase the quality of skywave service at night. These stations, by extending their daytime primary coverage and nighttime skywave services to points one and a half times more distant than they are presently serving, would substantially overcome some of the deficiencies which presently exist in the standard broadcast band. Moreover, my suggested allocation would permit our domestic stations to overcome interference from foreign stations without derogating any of our treaty commitments.

1015-1016

I lack the confidence of the majority that its decision will result in any substantive consequence. I submit that it imposes an unwarranted freeze to foster eleven peanut whistles which may never be constructed. Little else is accomplished.

[4146]

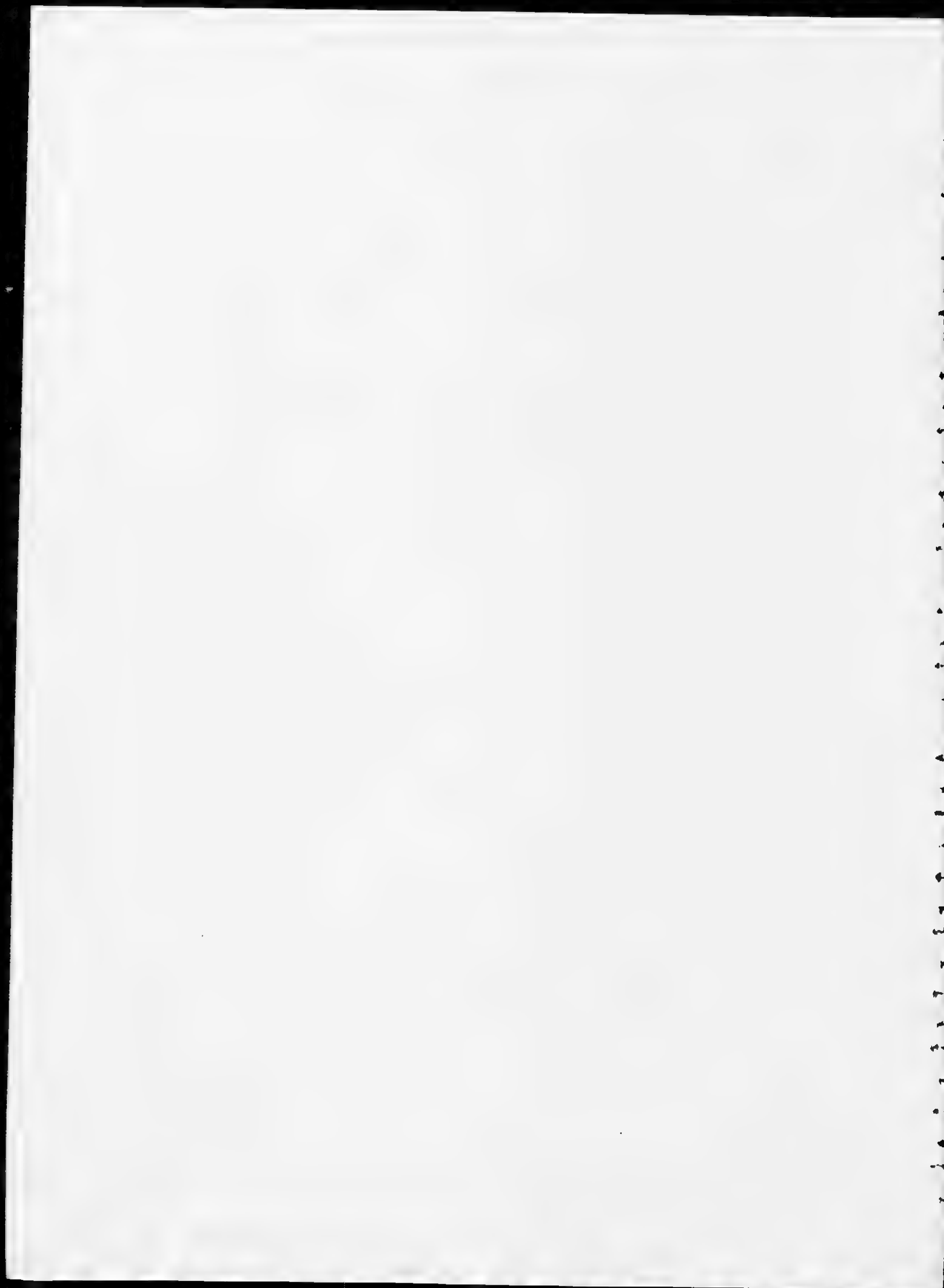
**STATEMENT OF COMMISSIONER JOHN S. CROSS  
CONCURRING IN PART AND DISSENTING IN PART**

After having this proceeding pending before it for over 16 years (since February 20, 1945), I consider it unfortunate that the majority of this Commission has finally offered the public what, in my opinion, is only a half-solution.

The United States has 25 Class I-A Clear Channels by virtue of international agreements. Under the majority decision, 13 of these Class I-A Clear Channels are to be duplicated on a controlled basis while action on the other 12 is to be deferred. I doubt that the basis for selecting which channels go into the one category and which in the other will ever be understood fully by the public, thereby subjecting the Commission to possible criticism that it acted arbitrarily in this regard.

In my opinion, the reasons of the majority for duplicating 13 of the 25 Class I-A Clear Channels on a controlled basis are sound and sufficient. However, I consider these reasons just as valid for those 12 channels on which action is deferred as they are for those 12 channels that are to be duplicated. Accordingly, I would treat all of them alike and duplicate them all on a controlled basis. This, in my opinion, would not only be fairer, but would also obviate any possible criticism or arbitrariness. In addition, it would strengthen our defense of these channels from foreign infringement. Moreover, it would eliminate the necessity for deferring the processing of applications for new stations on any frequencies within 30 kc of the 12 Class I-A Clear Channels that are not being duplicated -- a matter of considerable consequence since 23 (of the 107 available) frequencies are thereby involved.





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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington 25, D.C.

FCC 61-981

7796

In re Applications of:

KSTP, INC. (KOB)  
Albuquerque, New Mexico

For Modification of Construction  
Permit.

AMERICAN BROADCASTING-  
PARAMOUNT THEATRES, INC.  
(WABC & Aux.)

New York, New York

Has: 770 kc, 50 kw, U  
Requests: Renewal of existing  
license

)  
) Docket No. 6584  
) File No. BMP-1738  
)

)  
) Docket No. 14225  
) File No. BR-167  
)

MEMORANDUM OPINION AND ORDER

By the Commission:

1. The Commission has before it for consideration (1) the above-captioned applications; (2) a "Petition to Consolidate Applications for Hearing", filed on September 19, 1960 by KSTP, Inc. (KSTP); (3) Oppositions to the above Petition, filed on September 20 and October 3, 1960, by American Broadcasting-Paramount Theatres, Inc. (WABC); and (4) a reply thereto, filed on October 13, 1960 by KSTP.

2. Since the complete background of the proceedings in Docket Nos. 6584 and 6585 has been set forth in detail in Appendix A of the Commission's decision of September 3, 1958, (In re Albuquerque Broadcasting Co., 16 RR 765, Pg. 883) it need not again be restated. However, for the purpose of better understanding the nature of the pleadings now before us, we will summarize what has transpired subsequent to the decision of September, 1958 and bring this portion of the history to date. The decision to which we refer above, concluded

that Class I-A channel 770 kilocycles could best be utilized by the employment of two Class I stations thereon; and that both WABC and KOB would be permitted to operate on that frequency with 50 kilowatts of power, each employing a directional antenna designed to protect the other, with said directional antennas designed in accordance with the parameters specified in paragraph 22 of the findings of fact contained therein. Accordingly, KSTP was granted leave to amend its application for Albuquerque, New Mexico (File No. BMP-1738) and WABC was granted leave to file an application for authority to make changes in its existing operation, both applications to specify the type operation contemplated by the above decision. In addition, WABC was directed to file its application for renewal of license, which was to expire on June 1, 1960, no later than July 1, 1959.

WABC's Petition for Reconsideration of this action was denied by the Commission on September 8, 1959, In re Albuquerque Broadcasting Co., 16 RR 895, and on May 27, 1960, the United States Court of Appeals for the District of Columbia Circuit, on an appeal taken by WABC, affirmed the Commission's Decision of September 3, 1958, American Broadcasting-Paramount Theatres v. F.C.C., 20 RR 2001. On March 11, 1959, the KSTP application for Albuquerque, New Mexico was amended in accordance with the decision of September, 1958, supra. WABC, however, filed an application for renewal of its license (File No. BR-167) requesting the continuance of its existing operation.

3. On February 24, 1960, KSTP filed an application requesting authority to construct a new standard broadcast station to operate on 770 kilocycles at New York City (File No. BP-13932). This proposal specifies the type operation contemplated by the Commission in its decision of September 3, 1958. On August 22, 1960, WABC and KSTP were advised, pursuant to the then existing notice provisions of

Section 309(b) of the Communications Act of 1934, as amended, that since their applications were mutually exclusive (both requesting the same facilities) both could not be granted and accordingly, it was necessary that they be designated for comparative hearing to determine which proposal, if either, would better serve the public interest, convenience and necessity. In reply to this letter, KSTP filed its "Petition to Consolidate Applications for Hearing."

4. In its petition, KSTP contends that its application for Albuquerque (File No. BMP-1738) should also be consolidated in the above proceeding; that the application of WABC, requesting renewal of its 50 kilowatt non-directional operation on 770 kilocycles, will result in "ruinous interference" to its proposed directional operation as a Class I station at Albuquerque and that in view thereof, the above three referenced applications should be consolidated for hearing with a single "307(b)" issue scheduled for consideration.

5. WABC, by oppositions filed on September 20 and October 3, 1960, contends that the course of action proposed by KSTP is contrary to the Commission's Rules; to applicable precedent, and to the recent admonition of the Court of Appeals; that the holding of the United States Supreme Court in Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327, should not be construed in a manner which compels the Commission to give a mutually exclusive applicant comparative consideration with an existing licensee seeking renewal of its license, if it can be found that but for the existence of said new application, the public interest, convenience and necessity would be served by its renewal; that, moreover, said comparative consideration need no longer be afforded in view of the deletion in 1952 of the language in Section 307(d) of the Act which, in effect, stated that renewals be treated as original applications filed pursuant to Section 308(a) and also in view of the language added thereto, in 1952, indicating that existing licensees, absent a serious breach of the public trust, should be granted renewals

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almost as of course<sup>1/</sup>; that further, the Commission's decision of September, 1958, makes clear that the KOB proceeding had not been terminated thereby; that it had only decided two Class I stations may be assigned on 770 kilocycles and tentatively arrived at the proposed pattern of dual operation by KOB and WABC on that channel; that the Court of Appeals, on May 27, 1960, in passing upon the Commission's decision of September, 1958, also saw the necessity of further proceedings in this matter by stating that the position of ABC, as a network, should not be permanently prejudiced by forcing it to share a channel if other networks are given full use of clear channels and that failure by the Commission to give due consideration to WABC's claim for treatment comparable to that accorded other networks may be brought to the Court for review; that in view thereof, WABC argues, it has "cut-off protection" by reason of the unfinished aspects of the KOB proceeding and this fact necessarily precludes comparative consideration, at this time, of the KSTP application for its facilities; that moreover, any consideration given the KSTP application requesting operation on 770 kilocycles at New York City, would violate the Commission's Order of August 9, 1946 (1 RR 53;905) which provides in substance that applications requesting operation on 770 kilocycles will be placed in the pending files until conclusion of the proceedings in Docket No. 6741 (Clear Channel proceeding).

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<sup>1/</sup> The language deleted by the 1952 amendment to Section 307(d) of the Act is as follows:

"... but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications."

The pertinent language added to Section 307(d) of the Act by the 1952 amendment and to which petitioner refers above, is as follows:

"... In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is not directly material to the considerations that affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings."

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6. KSTP's reply, filed on October 13, 1960, controverts, categorically, all of the above arguments asserted by WABC. In substance it replies that the 1952 amendments to the Communications Act did not affect an applicant's right to have its proposal considered comparatively with an application for renewal when it is mutually exclusive therewith; that no further proceedings remain in the KOB-WABC matter which provides "cut-off protection" to the WABC renewal application; and that the "admonition" of the Court of Appeals, to which WABC refers, cannot be construed to mean that the Commission must hear the claims of WABC with respect to its network position before any further action can be taken in accordance with the Commission's decision of September, 1958. In view of the above, KSTP again requests that its applications for New York City and Albuquerque be consolidated for hearing with the renewal application of WABC.

7. In view of the doctrine expressed by the United States Supreme Court in Ashbacker Radio Corp. v. Federal Communications Commission, (supra), we have consistently held that an application for renewal of a broadcast license must be designated for comparative hearing with any other mutually exclusive applications then pending before the Commission, In re Hearst Radio, Inc. (WBAL), 3 Pike & Fischer RR 731 (1947); Robert E. Bollinger, 13 Pike & Fischer RR 881 (1957); Wabash Valley Broadcasting Co. (WTHI-TV), 18 Pike & Fischer RR 562 (1959); Radio Voice of New Hampshire, Inc. (WMUR-TV), Order of May 1, 1957 (FCC 57-433); Oroville Broadcasters, (KMOR), Order of



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November 5, 1958 (FCC 58-1041). WABC claims, however, that because of the 1952 amendments to the Communications Act, comparative consideration need no longer be afforded a mutually exclusive applicant in a license renewal hearing. (See Para. 5, supra)<sup>2/</sup>. We do not agree that the 1952 amendments to the Act intended or accomplished such a result. Section 301 of the Communications Act provides that no license shall be construed to create any right beyond the terms, conditions and periods of the license; while Section 304 requires that a prospective licensee sign a waiver of any claim to the use of a particular frequency because of the previous use of the same, before such license may be granted. Thus, it appears clear that the Act intends no person to have anything in the nature of a property right as a result of the grant of a license; that broadcast licenses are limited to a maximum of three years duration and may be revoked at any time for good cause shown; that

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<sup>2/</sup> WABC further argues that since the Commission does not afford this opportunity to mutually exclusive applicants in transfer and assignment situations under Section 310(b) of the Act, which section in turn makes reference to Section 308, it need not afford these rights under the provisions of Section 307(d) of the Act. This contention can be answered by the language of Section 310(b) itself. Therein it is stated ". . . but in acting thereon the Commission may not consider whether the public interest, convenience and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee."

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before such license can be renewed, it must be determined, pursuant to Section 307(d) of the Act, that the public interest, convenience and necessity would be served thereby and that if, after a hearing on such application for renewal, said finding cannot be made, the frequency

presently occupied remains free for a new assignment to another licensee in the interest of the listening public. See Federal Communications Commission v. Sanders Brothers Radio Station 309 U.S. 470, 9 RR 2008, pg. 2011. To refuse, then, a mutually exclusive applicant at this stage of a proceeding, the opportunity to show that its proposal would better serve the public interest, would be a denial of the rights afforded such applicants by the Communications Act of 1934, as amended, as well as a violation of the Commission's duty to determine, as among all available applicants requesting the same facilities, whose proposal would best serve the public interest, convenience and necessity. To illustrate further the fallaciousness of the instant argument advanced by WABC, we observe that the Court of Appeals, in its decision of May 27, 1960, also recognizes this right afforded applicants for broadcast facilities, for therein, in discussing WABC's right to raise the claim regarding its network position vis a vis the other networks, the Court states:

"It may be that ABC can raise its claim in this regard by filing competitive applications when present licensees on other frequencies seek renewal or by seeking modification of existing licenses held by others". (See 20 RR pg. 2005).

8. Nor can we accept WABC's argument that its renewal application has "cut-off protection" by virtue of the fact that the decision of September 3, 1958, in Docket Nos. 6584 and 6585 (16 RR 765, supra), did not conclude the KOB matter. A similar contention was raised by WABC in its petition for rehearing, filed on October 6, 1958. Therein it was requested, inter alia, that the Commission modify its decision of September 3, 1958 to make it clear that the conclusions there reached are "tentative" only. In reply thereto, the Commission stated as follows:

"The conclusions set forth in the decision under review constitute our considered judgment. In the sense that any Commission decision or action may be modified when changed conditions and the

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public good require it, the instant decision is tentative. In the sense that the Commission at present contemplates no further evidentiary hearing on the decision reached herein, the decision is final." (16 RR 895, para. 12, September 8, 1959).

In view of the foregoing language, no useful purpose would be served herein by further entertaining the claim that the September 3, 1958 decision in Docket Nos. 6584 and 6585 was not considered final.

9. Moreover, WABC's assertion that the Commission's Order of August 9, 1946 (1 RR 53:905) precludes consideration of the KSTP application for New York City at this time, is also without merit. This order,

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providing, in substance, that applications requesting operation on 1030 or 770 kilocycles, be placed in the pending files until resolution of the Clear Channel proceeding (Docket No. 6741), was instituted to insure the status quo of these frequencies, by precluding additional assignments thereon which would further aggravate the "anomalous situation" which then existed on 770 and 1030 kc, and thereby render more difficult a satisfactory solution of the matter. However, the KSTP application does not request an additional assignment on 770 kilocycles. Its application requests those facilities presently utilized by WABC; only one can be granted, and regardless of which may be favored in a hearing, the status quo with respect to the location and number of standard broadcast stations on 770 kc will be maintained. Thus, the order of August 9, 1946 is not applicable to the KSTP application requesting operation on 770 kilocycles in New York City.

10. WABC further contends that the "admonition" of the Court of Appeals in its opinion of May 27, 1960 also precludes the consolidation of the KSTP application with its renewal application. The Court

in its opinion did concern itself with the possible adverse affects on ABC as a network, and it was stated therein that the Commission should "... give due consideration to ABC's claims for treatment comparable to that accorded other networks. . . ." However, nowhere in its opinion did the Court indicate, as contended by WABC, that until it is afforded these opportunities, the present utilization of 770 kilocycles must remain unchanged. Rather, it upheld the Commission's decision of September 3, 1958, which concluded that the mandate of Section 307(b) of the Act would best be served by permitting Station KOB, Albuquerque, to operate with 50 kilowatts, directional antenna, night and by the amendment of Section 3.25(a) of the Rules to provide that the Commission may authorize the operation of two Class I stations on 770 kilocycles.

11. Although WABC's pending application requests continuance of its non-directional operation on 770 kilocycles,<sup>3/</sup> the Commission's decision of September 3, 1958, concluded, as indicated supra, that the frequency 770 kilocycles would best be utilized by permitting WABC and KOB to operate with 50 kilowatts of power, unlimited time, each employing a directional antenna designed to protect the other. The findings of fact and the conclusions of law reached therein are final and conclusive on the question concerning what type operation on the frequency 770 kilocycles would best effectuate the mandate of Section 307(b) of the Act; See In re Albuquerque Broadcasting Co., 16 RR 895, Para. 12, supra. However, the Commission feels, in view of the language contained in the opinion rendered by the United States Court of Appeals on May 27, 1960, that it would be appropriate at this time to reopen the record in Docket No. 6584 in order to consider any additional evidence to be presented by WABC with respect to its network position on the frequency

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<sup>3/</sup> Favorable consideration on the above renewal application of WABC

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would seriously prejudice a grant of the pending KOB proposal, since the WABC 0.25-10% skywave interfering contour would substantially reduce the nighttime coverage area of KOB's proposed operation.

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770 kilocycles and to determine in the light of such evidence whether the issue is such that it overrides the 307(b) determination previously rendered by the Commission in its decision of September 3, 1958. Therefore, we propose to consolidate WABC's application (File No. BR-167) for renewal of license for hearing with KSTP's amended application (File No. BMP-1738) for Albuquerque, New Mexico, and to reopen the record in that proceeding for such limited purpose, and for that purpose alone. No additional evidence will be permitted to be adduced under issue 1, infra, since, as stated above, our findings of fact and conclusions of law previously reached with respect to Section 307(b) of the Act are final and conclusive. The purpose of including this issue and issue 3 is simply to permit the Commission to take appropriate action upon the above-captioned applications in the light of the additional evidence to be adduced pursuant to issue 2.

12. We do not deem it appropriate to consolidate KSTP's application (BP-13932) for New York City for hearing at this time, since after the hearing ordered herein has been completed a comparative hearing with WABC's application for renewal may prove to be unnecessary. We wish to make it absolutely clear, however, that our action herein in no way impairs KSTP's right to a comparative hearing with WABC, if WABC's renewal application is not denied after this hearing. Furthermore, the possibility exists that the Commission may deny WABC's renewal application, but, in its discretion, as a consequence of the evidence adduced pursuant to issue 2, below, find it in the public interest to afford WABC a final opportunity to file an application for authority to make changes in the operation of Station WABC in the manner specified

in Paragraph 22 of our September, 1958 decision in this proceeding. Should these findings be made, and should WABC choose to file such an application, the comparative hearing would then be between KSTP's pending proposal for New York City and WABC's new application.<sup>4/</sup> If the Commission's decision on the first two issues below indicates grant of the KOB application for modification of construction permit (BMP 1738), but such further proceedings are also found to be necessary, the KOB application will be granted, a construction permit will be issued to KOB immediately and operation will be authorized in regular course, inasmuch as those actions cannot be affected by the outcome of the subsequent proceedings.

In view of the foregoing, IT IS ORDERED, That the "Petition to Consolidate Applications for Hearing" filed by KSTP, Inc. IS GRANTED to the extent provided for below, and IS DENIED in all other respects and that pursuant to the provisions of Section 309(e) of the Communications Act of 1934, as amended, the above-captioned and described applications ARE DESIGNATED FOR CONSOLIDATED HEARING on the following issues:

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<sup>4/</sup> It should be noted that KSTP's application (BP-12932) for New York City appeared on the "cut-off" list of July 6, 1961, with a "cut-off" date of August 14, 1961. Obviously, should the situation described above eventuate, the Commission will waive Section 1.354(c) to permit comparative consideration of WABC's application.

1. To determine in view of our findings and conclusions in Docket No. 6584 with respect to KOB's proposal and Section 307(b) of the Communications Act of 1934, as amended, whether the public interest would be served by a grant of WABC's application (BR-167) for renewal of license for its present facilities, or the application of KSTP, Inc. (BMP-1738) for Albuquerque, New Mexico.



2. To determine whether the consideration of providing facilities to the ABC Network in New York on a basis which is fair and equitable in comparison with other radio networks should vary the conclusion with respect to issue 1, above.

3. To determine, in the light of our findings and conclusions in Docket No. 6584 and the evidence adduced pursuant to issue 2 above, which of the above-captioned and described applications should be granted.

IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence and the burden of proof as to issue "2" above shall be on the American Broadcasting-Paramount Theatres, Inc.

IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants herein, pursuant to Section 1.140 of the Commission's Rules, in person or by attorney, shall, within twenty (20) days of the mailing of this Order, file with the Commission in triplicate a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

IT IS FURTHER ORDERED, That further action on KSTP, Inc.'s application (BP-13932) for New York, New York, will be withheld pending a final decision in the hearing herein ordered.

IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 1.362(b) of the Commission's Rules, give notice of the hearing, within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by Section 1.362(c) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Ben F. Waple  
Acting Secretary

[Signed by Above  
Mailed By  
August 4, 1961  
Mail & Files]

Adopted: July 26, 1961  
Released: August 4, 1961

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FCC 61-1197  
10911

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Bartley absent; Commissioner Craven not participating.

1. In a Memorandum Opinion and Order released August 4, 1961 (FCC 61-981, Mimeo No. 7796), the Commission specified as one of the hearing issues the question of whether the consideration of providing facilities to the ABC Network in New York on a basis which is fair and equitable in comparison with other radio networks should vary the conclusion reached in Albuquerque Broadcasting Company, 16 RR 765 (FCC 58-814, adopted September 3, 1958) that the frequency 770 kc would best be utilized by permitting Station WABC, New York City, and Station KOB, Albuquerque, New Mexico, to operate on this frequency with 50 kilowatts of power, unlimited time, each employing a directional antenna designed to protect the other.

2. The petition for clarification or enlargement of issues, filed August 24, 1961, by American Broadcasting-Paramount Theatres, Inc., rests upon the basic premise that there must be considered in this proceeding frequencies other than 770 kc. This premise is erroneous. The Commission's determination that other channels should not be considered in this proceeding has already been judicially sustained as within our discretionary authority. See American Broadcasting-Paramount Theatres, Inc. v. FCC, 108 U.S. App. D.C. 83; 280 F.2d 631; 20 RR 2001 (May 27, 1960). Only if it is ultimately determined in the above-captioned proceeding that KOB's application to operate on 770 kc, DA, should be denied would there be any occasion to reopen the question of alternative channels for the underserved Southwest area of the country. To consider alternative channels in the present posture of the proceeding would not only be premature, but would be tantamount

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to a reconsideration of our earlier determination, affirmed by the Court of Appeals, that other channels need not be considered.

ACCORDINGLY, IT IS ORDERED, This 11th day of October, 1961, that the petition to clarify or enlarge issues, filed August 24, 1961, by American Broadcasting-Paramount Theatres, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Ben F. Waple  
Acting Secretary

[Signed by Above  
Mailed By  
October 16, 1961  
Mail & Files]

Released: October 16, 1961

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EXHIBIT NO. 1 KSTP

AN ABC RADIO NETWORK  
PRESENTATION  
TO  
THE NATIONAL CIGAR INSTITUTE  
APRIL 1960

THE CIGAR SMOKING MARKET

In a recent analysis of the cigar smoking market, Radio Advertising Bureau came up with some very interesting facts and figures on the American cigar smoker:

5.8% of the men in the country are regular cigar smokers and 16.2% are occasional cigar smokers. Women are the major obstacle in the path of increased cigar sales. Most women not only hate the smell of a cigar but also abhor the look of a cigar in a man's mouth.

THE MORE THEY MAKE THE MORE THEY SMOKE

The highest penetration of cigar smokers is found among high income men. 17.3% of men in the under \$1,000 bracket smoke cigars and 27.2% of men making \$7,000 or over smoke cigars. The rest fall between according to income.

THE NORTHEAST HAS THE MOST SMOKERS

25% of men in the Northeast smoke cigars; 23.5% of men in the North Central Region; 19.2% of men in the South; and 16.9% of men in the West.

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Ex. No. 1 KSTP (Cont'd)

1032

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SMOKERS BY CITY SIZE

There is little difference in cigar smoking by city size. About 22% of urban men and the same number of rural men smoke cigars. This falls off in farm families though where only 17.1% smoke cigars.

SMOKERS BY AGE

After age 24, there is little change in the penetration of smokers in various age brackets. 11.3% of men 18-24 smoke cigars. Highest penetration of cigar smokers is in the 45-54 age group (25.9%). These figures are only slightly higher than those for other age groups after age 24.

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SPECIAL CHARACTERISTICS OF THE CIGAR MARKET

The foregoing analysis of the cigar market by RAB points to the need for this too -- fold selling approach:

1. To win new cigar smokers by removing the chief obstacle -- female objection.
2. To win occasional and new cigar smokers by stressing masculinity.

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THE POTENTIAL CIGAR SMOKER AND RADIO

Since the greatest number of potential cigar smokers are in the age group from 18 to 35 (young men) and since they are in the best position to overcome female objections, radio is especially adapted to reach this market.

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YOUNG MEN AND RADIO

In June of 1959, Pulse, Inc., conducted a special study for RAB on

the listening habits of Young Men in the 25 to 35 age group. (1200 Young Men were interviewed in 6 metropolitan areas: Atlanta, Chicago, Ft. Worth, Philadelphia, St. Louis, San Francisco).

#### HOW MANY LISTEN

This study showed that 94.4% of men 25 to 35 listened an average of 13 hours and 51 minutes each week -- virtually two hours every day.

#### HOW OFTEN DO THEY LISTEN

On a WEEKDAY, 1 hour and 53 minutes was spent listening to the radio while on a WEEKEND, 2 hours and 13 minutes.

#### WHEN DO THEY LISTEN

More than 3 out of 4 listen on any given WEEKDAY, more than 7 out of 10 on a WEEKEND day.

1. On the average WEEKDAY MORNING 56.0% of all Young Men questioned listened to Radio; 36.5% in the AFTERNOON; 39.2% in the EVENING.
2. On the average WEEKEND MORNING 45.3% of all Young Men questioned listened to Radio; 34.8% in the AFTERNOON; 35.0% in the EVENING.

#### WHAT DO YOUNG MEN LISTEN TO ON RADIO

More Young Men prefer News and Sports programming to any other specific programming.

1. On an average WEEKDAY 53.7% of all Young Men listeners tuned to NEWS.
2. On an average WEEKEND 46.4% of all Young Men listeners tuned to NEWS.

To satisfy this programming demand .....



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Ex. No. 1 KSTP (Cont'd)

1034

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ABC PRESENTS THREE COMMERCIAL CARRIERS ALL DESIGNED TO MEET THE ADVERTISING NEEDS OF THE NATIONAL CIGAR INSTITUTES' CAMPAIGN:

1. ABC RADIO'S WEEKDAY NEWS.
2. ABC RADIO'S NEWS ON THE WEEKEND.
3. ABC RADIO'S SPEAKING OF SPORTS with HOWARD COSELL.

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ABC RADIO WEEKDAY NEWS

Monday thru Friday

A schedule of five-minute newscasts through the day -- in the scoop spots five minutes before the hour, starting at 8:55 AM on through till 11:55 PM.

ABC Radio's "Late News" is exactly that -- the late news, the hard core of the news, the big, important stories --

- told in crisp, concise fashion by top ABC Radio newscasters --
- in a series of five-minute newscasts deliberately scheduled at five minutes before the hour -- in a spot that leads and frequently scoops other news media.

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ABC News Coverage at Home & Abroad:

Headed by John Daly

Five-minute newscasts in before-the-hour periods have become an automatic tuning habit for millions of ABC Radio listeners. Good reason. They want the news as soon as they can get it because world events can happen with such rapidity that, like yesterday's headlines, the previous hour's news is old stuff.

To keep the news updated, getting it on the air as soon as it has happened, minute by minute, ABC Radio maintains a staff of 125 writers and correspondents, headed by the nationally celebrated news analyst, John Daly. In addition, John Daly's staff includes twenty-two

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overseas reporters poised in world headline-making spots: Beirut, Moscow, Paris, and nineteen other newsmaking centers. They are continually rushed to trouble-brewing spots everywhere on the globe.

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#### ABC Radio News is Often Scoop News

Because of ABC Radio's on-the-alert news staff and because of radio's technical mobility it often scoops every other news-gathering medium. Words can be spoken into a microphone in the presence of an Iraqi mob or in the midst of landing marines or in scooping a Khrushchev reaction to American strategy, words that are heard immediately in millions of American homes and cars and public listening places.

And people have been getting more of their scoops via ABC Radio than perhaps from any other single source:

#### ABC Radio London Scoop:

ABC Radio's Yale Newman reported that Eisenhower and Macmillan had agreed to meet with Khrushchev in a summit conference at the U. N. in N.Y. Three hours later the official announcement came from Washington and London.

#### ABC Radio Paris Scoop:

Lebanese President Camille Chamoun's appeal for United States, Britain and France troops was confirmed by ABC correspondent Serge Flegers in Paris Monday night, a day before troops arrived on Tuesday.

#### ABC Radio Washington Scoop:

ABC Radio's comprehensive summaries on Sherman Adams testimony beat the wire services. Despite the handicaps imposed by the House rules banning radio and television, ABC reporters John Secondari and John Edwards, working in shifts used a microphone just outside the door of the hearing room and gave summaries, conducted interviews, at the half hour and during regular ABC news shows.

An indication of ABC's up-front news position is the fact that the front pages of the nation's newspapers carried the above stories, crediting ABC Radio News as their source.

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ABC RADIO NEWS ON THE WEEKEND

Saturday and Sunday

Up-to-the-minute coverage of the Weekend News in a series of five-minute newscasts - five minutes before the hour and 25 minutes after the hour.

ABC Radio Weekend News is designed to serve the modern American family on their weekend -- when they have more time to listen -- whether at home or on the go. Weekend America is mobile and ABC Radio News keeps pace with listeners.

ABC Radio Weekend News keeps listeners informed on the changing world - the five-minute newscasts being scheduled all through Saturday and Sunday, mostly in the scoop spots five minutes before the hour and 25 minutes after the hour.

# AMERICAN WEEKEND NEWS <sup>52</sup>

**18 five-minute broadcasts  
Saturday and Sunday**

**MODERN RADIO NEWS  
FOR THE MODERN  
AMERICAN  
LISTENING PATTERN**



NEWS FOR THE MODERN AMERICAN WEEKEND, reaching Americans at home and on the go, wherever the pursuits of their leisure time take them. Weekend America is mobile, and no news medium keeps pace with that mobility like American radio.

NEWS WHICH SETS REPORTING STANDARDS for accuracy, clarity, immediacy. American radio news is constantly updated, always available, fully reported throughout the fast-breaking weekend period by American's unexcelled 123-man team of correspondents, reporters, writers and editors.

NEWS WHICH CARRIES AUTHORITY, added credibility as the setting for sponsor messages, heightens listener interest with the urgency and personal importance of each broadcast.

NEWS WHICH REACHES MORE THAN 14,500,000 U. S. FAMILIES in a month, in and out of home, averaging 3.5 times (based on Nielsen special tab, Dec., 1956). Weekend News is heard by 22.7% of U. S. TV homes, 35.9% of U. S. radio only homes in four weeks.

**PERFORMING A VITAL PUBLIC SERVICE WITH POWER, PROFESSIONAL  
THOROUGHNESS AND STYLE, AMERICAN WEEKEND NEWS IS GEARED TO SELL!**



American Broadcasting Network

1038

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ABC RADIO'S

SPEAKING OF SPORTS with HOWARD COSELL

Monday thru Friday 6:50-6:55 PM

This program is a fast, lively and comprehensive round-up of the events and results in the day's news in the world of sports -- plus short features and interpretative comments from the Cosell viewpoint.

Saturday and Sunday

Series of 10 Five-minute Sportscasts

In the world of sports, the major events either take place or reach their climax largely on weekends.

Hence, Speaking of Sports reaches ABC radio listeners at the time when their interest in sports is at a peak.

Ten times during the weekend, Howard Cosell goes on the air with the latest developments. This weekend program series is also where Cosell features his top-flight guests and his pungent commentary.

**WHEN THERE'S SPORTS NEWS TO BE MADE 54**

1039

**EXCLUSIVELY****HOWARD COSELL MAKES IT *✓* ON ABC RADIO**

Where there's sports news, there's Cosell -- Howard Cosell -- ABC Radio's fast-moving reporter who has racked up exclusive after exclusive, been there first to ask the questions and get the answers sports fans want! Press and wire services monitor Howard Cosell's **SPEAKING OF SPORTS** broadcasts weekday nights and weekends on ABC, because they know that's where the sports news is. Here's just a small sampling from Howard Cosell's arm-long record of radio firsts and exclusives from the world of sports ...



TED WILLIAMS first confirmed to Howard his famous blast at draft boards . . .

When JACKIE ROBINSON quit baseball, the first reporter he talked to was Howard Cosell . . .

In the tennis world, Cosell's first include talks with LEW HOAD when he turned pro, and ALTHEA GIBSON when she came back to the U.S. with the Wimbledon crown . . .

Cosell was there first when STAN MUSIAL registered the 3000th hit of his major-league career . . .

Jockey CONN McCREARY told Howard exclusively what the public didn't know -- that Silky Sullivan was the only Derby horse not shod for running in mud . . .

CARMEN BASILIO talked to Howard right after his bout with Sugar Ray Robinson . . .

DON NEWCOMBE's first appearance with the hypnotist who's treating his fear of flying was on Cosell's show . . .

Howard got to top golfer DICK MAYER first after he won the National Open . . .

More than 50 times in the last year, the reporter first on the scene, the one who came away with the exclusive quote that had the world of sports buzzing -- was ABC Radio's HOWARD COSELL. Knowing sports people, drawing on a legion of contacts developed by legal practice for sports figures, Howard Cosell asks pointed questions, gets to the issues -- and makes sports news.

YOUR ABC RADIO REPRESENTATIVE  
WILL BE HAPPY TO TELL YOU HOW

SPEAKING OF SPORTS  
with HOWARD COSELL

WHICH REACHES THE PEOPLE  
INTERESTED IN SPORTS, CAN DO A  
BIG ADVERTISING JOB FOR YOU!!

# 1041 move over for Howard Cosell

★ SPEAKING OF SPORTS  
with HOWARD COSELL  
WEEKDAYS, 6:45-:50 PM, NYT  
& AFTERNOONS & EVENINGS  
ON SATURDAY & SUNDAY



## JACKIE ROBINSON

A few weeks ago I visited Buffalo, N. Y., on a business trip. During my stay it was my privilege to visit a number of radio and television studios to be interviewed. Somehow it always seems to me a challenge to help make an interview a successful one, and there were plenty of challenges in Buffalo.

I was particularly impressed, however, by a young lady named Doris Jones of WKBW. As mistress of ceremonies, she displayed as much charm, personality and professional bearing as any I have ever met. Though she assured me she is quite happy in Buffalo, I wouldn't be surprised if the networks weren't knocking on her door before very long.

Radio and television interviewing has rapidly become a highly specialized field. The Mike Wallaces and Ed Murrows have set some pretty high standards. Still, there's one man in the sportscasting end of the business whom I consider right up there with the best in the business—Howard Cosell of ABC.

I remember when Howard was a young lawyer just breaking into the field with a kid show some years ago. Since then, I've marveled at his meteoric rise. Eventually he left his law practice completely and went into sports broadcasting. And today, whenever I turn on ABC radio, it seems Howard is either interviewing someone "live," or else replaying a previous broadcast to point up what the subject thought he would be doing in July when the interview was taped in February. I find this particularly interesting in the sports field, and it often produces some hearty laughs.

I used to smile at Howard during my baseball days, when he would turn up at the field or the clubhouse, lugging along his own tape machine for on-the-spot interviews with the players. There'd be a big laugh when someone sang out: "Here comes that man—again!" Still, Howard was often a big jump ahead of other broadcasters by being right there on the scene with his equipment when important events occurred.

Howard has another advantage which probably stems from his legal background. He asks really provocative questions that stimulate interesting answers. Of course, this sometimes causes some athletes to be wary of his probing queries. But I've always found him fair and honest in his approach, and I've never yet heard of his overstepping the bounds of propriety.

If you speak to Dick Groat of the Pittsburgh Pirates, for instance, you'd find him saying: "Howard Cosell treats the athlete as an intelligent human being. He asks questions that make sense, and makes us think when we answer. Our team respects him for this, and as for myself, I would rather talk to Howard than to any other broadcaster. He makes it a point to know me, and he makes me feel as if he cares about me." High tribute from Dick.

Frankly, whenever I've known in advance that I was to be interviewed by Cosell, I've gone as well prepared as I could. His questions are probing, but I feel it's important for the public to know and understand what makes an athlete tick.

Howard Cosell does just that, and well. And I predict that before long he will have firmly established himself as America's Number One sportscaster.

So move over, you other guys . . .

### New York Post Sports

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NEW YORK, MONDAY, JUNE 1, 1969

the best in the business

right there on the scene

makes us think

probing

America's Number One  
sportscaster

## ABC RADIO NETWORK

1042

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RADIO ON TARGET FOR THE NATIONAL CIGAR INSTITUTE

Radio is the ideal medium to pinpoint a market to an advertiser, with 174,394,000 radio receivers around the country, giving 98% coverage of all American homes, including a remarkable out-of-home mobility with nearly 40,387,000 car radios, 18,000,000 portables and 10,000,000 radios in public places.

Radio goes with your sales prospect to any room of the house -- accompanies him to any out-of-home locale.

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INSIDE COVERAGE

ABC Radio's coverage of 95% of U. S. radio homes is strongly supplemented by its dominance over other radio networks in "inside market" coverage. This superior inside coverage means that more of the stations affiliated with ABC are an integral part of, and centrally located in, their communities, and that they generally get more acceptance and believability from programming and commercials than do outsider stations whose signals may reach into a local market.

ABC Radio offers a vast potential market - a package combination of WEEKDAY NEWS and/or NEWS ON THE WEEKEND and/or SPEAKING OF SPORTS - would give the National Cigar Institute effective coverage of the U. S. young male listener market.

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ABC TOPS IN INSIDE COVERAGE

A recently completed coverage analysis reveals that the ABC RADIO NETWORK offers advertisers greater inside coverage in the nation's top 200 markets than any other network.

Inside coverage in these vital markets means there is more community acceptance of advertising and better publicity promotion and merchandising support than "outsider" stations command.

1043

Thus, ABC station dominance in inside coverage of the nation's top 200 markets indicates that ABC Radio Network lends itself more readily to local dealer and merchandising support by advertisers than any other network simply because there are more local ABC affiliates in these markets. And these 200 markets contain almost three out of every five families in the nation, accounting for 69.9% of all retail sales today.

Here are the figures:

	<u>Number of Top 200 Markets With Local Network Affiliates</u>	<u>Number of Markets Covered Locally</u>	<u>Retail Sales (add 000)</u>
ABC	152		\$ 127,738,130
CBS	128		120,408,143
MBS	121		103,387,452
NBC	119		119,253,978

These figures indicate that ABC Radio has an affiliate in all but 48 of the nation's top 200 markets. This is 24% more efficient than the average of all other networks.

An interesting addition to ABC's overall superiority in all 200 markets can be noted if the 200 markets are broken into four groups of 50 markets each. When we do this, we emphasize just how great ABC's advantage actually is:

1. ABC has a local station in 46 out of the top 50 and 88 out of the top 100. All other networks maintain affiliates in an

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average of only 77 of the top 100 markets.

2. In each of the groups of 50 markets, ABC shows the greatest number of markets covered, pointing up ABC's constant inside coverage advantage over all networks.

The attached table shows all the top 200 markets, broken by groups of 50, that each network covers locally and markets which are not covered.

+ Markets covered locally.

### Markets not covered.

TOP 200 MARKETS COVERED LOCALLY  
BY NETWORK AFFILIATES  
(SHOWING RETAIL SALES BY GROUPS OF 50)

*U.S. MKT. RANK	MARKET	ABC	CBS	MBS	NBC
1	New York, N E N. J.	+	+	+	+
2	Los Angeles, Long Beach, Calif.	+	+	###	+
3	Chicago, Ill	+	+	+	+
4	Philadelphia, Pa.	+	+	+	+
5	Detroit, Mich.	+	+	+	+
6	Boston, Mass.	+	+	###	+
7	San Fran, Oakland, Calif.	+	+	+	+
8	Pittsburgh, Pa.	+	+	+	+
9	Washington, D.C.	+	+	+	+
10	Saint Louis, Mo.	+	+	+	+
11	Cleveland, Ohio	+	+	+	+
12	Minneapolis, St. Paul, Minn.	+	+	+	+
13	Baltimore, Md.	+	+	+	+
14	Buffalo, N.Y.	+	+	+	+
15	Milwaukee, Wisc.	+	###	+	+
16	Houston, Texas	+	+	###	+
17	Miami, Fla.	+	+	+	+
18	Dallas, Texas	+	+	+	+
19	Kansas City, Mo.	+	+	###	+
20	Seattle, Wash.	+	+	+	+
21	Cincinnati, Ohio	+	+	+	+
22	Atlanta, Ga.	+	+	+	+
23	Denver, Colo.	+	+	+	+
24	San Diego, Calif.	+	+	+	+
25	Portland, Ore.	+	+	+	###
26	Tampa, St. Pete, Fla.	+	+	+	+
27	Brdgpt, Stmfrd, NR Conn.	+	###	###	###
28	Indianapolis, Ind.	+	+	###	+

*U.S. MKT. RANK	MARKET	ABC	CBS	MBS	NBC
29	Hartford, N. Britain, Conn.	+	+	+	+
30	Columbus, Ohio	###	+	+	###
31	San Bernardino, Calif.	+	###	+	###
32	New Orleans, La.	+	+	+	+
33	Providence, Pawtc, R.I.	+	+	###	+
34	Louisville, Ky.	+	###	+	+
35	Albany, Schntdy, Troy, NY	+	+	+	+
36	New Haven, Waterbury, Conn.	+	+	+	###
37	Dayton, Ohio	###	+	###	###
38	Rochester, N.Y.	###	+	###	+
39	San Jose, Calif.	###	###	###	###
40	Fort Worth, Texas	+	+	+	+

+ Markets covered locally    ### Markets not covered

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41	Phoenix, Ariz.	+	+	+	+
42	Memphis, Tenn.	+	+	###	+
43	Youngstown, Ohio	+	+	+	+
44	Worcester, Mass.	+	###	###	+
45	San Antonio, Texas	+	+	+	+
46	Birmingham, Ala.	+	+	+	+
47	Jacksonville, Fla.	+	+	+	+
48	Sacramento, Calif.	+	+	+	+
49	Akron, Ohio	+	+	+	###
50	Springfield, Holyoke, Mass.	+	+	###	###



TOP 50 SUMMARY

	<u>No. of Mkts. Covered Locally</u>	<u>Retail Sales (add 000)</u>
ABC	46	\$100,047,753
CBS	44	97,546,653
MBS	37	80,188,279
NBC	41	95,883,523

<u>*U.S. MKT. RANK</u>	<u>MARKET</u>	<u>ABC</u>	<u>CBS</u>	<u>MBS</u>	<u>NBC</u>
51	Norfolk, Ports, Va.	+	+	+	###
52	Oklahoma City, Okla.	+	###	+	###
53	Omaha, Neb.	+	+	+	+
54	Alltn Bethl, Easton, Penna.	###	+	###	+
55	Toledo, Ohio	+	+	+	+
56	Syracuse, N.Y.	+	+	+	+
57	Salt Lake City, Utah	+	+	+	+
58	Richmond, Va.	+	+	+	+
59	Wilmington, Del.	+	###	###	+
60	Nashville, Tenn.	+	+	+	+
61	Canton, Ohio	+	###	+	###
62	Fresno, Calif.	+	+	+	+
63	Tulsa, Okla.	+	+	+	+
64	Flint, Mich.	+	+	+	+
65	Trenton, N.J.	###	###	+	###
66	Grand Rapids, Mich.	+	+	+	+
67	Wichita, Kansas	###	+	+	###
68	Fall River, N. Bedford, Mass.	###	###	+	###
69	Orlando, Fla.	+	+	+	+
70	Harrisburg, Pa.	+	+	+	+
71	Fort Lauderdale, Fla.	###	###	###	###
72	Wheeling, W.Va., Steubenville, Ohio	+	+	+	###
73	Knoxville, Tenn.	+	+	###	+

*U.S. MKT. RANK	MARKET	ABC	CBS	MBS	NBC
74	Des Moines, Iowa	+	+	+	+
+ Markets covered locally		### Markets not covered			
[63]					
75	Davenport, Rock Is. Mol, Ia. Ill.	+	+	+	+
76	Bakersfield, Calif.	+	+	+	###
77	Peoria, Ill.	###	+	###	+
78	Beaumont, Port Arthur, Texas	+	###	+	###
79	Greensboro, High Pt. N. Car.	+	+	+	###
80	Spokane, Washington	+	+	+	+
81	Charleston, W.Va.	+	+	+	+
82	Lansing, Mich.	+	###	###	+
83	Utica, Rome, NY	+	+	###	###
84	Charlotte, N. Car.	+	+	+	+
85	West Palm Beach, Fla.	+	+	+	+
86	Wilkes Barre, Hazelton, Pa.	+	###	+	+
87	Tacoma, Wash.	+	+	+	+
88	El Paso, Texas	###	+	+	+
89	Duluth, Superior, Mich. Minn. Wisc.	###	+	+	+
90	Mobile, Ala.	+	+	###	+
91	Albuquerque, N. Mex.	+	+	+	+
92	Reading, Pa.	+	+	###	+
93	Chattanooga, Tenn.	+	+	+	+
94	Lancaster, Pa.	+	###	+	+
95	South Bend, Ind.	+	+	+	###
96	Shreveport, La.	+	###	+	+
97	Fort Wayne, Ind.	+	+	###	+
98	Stockton, Calif.	+	###	###	###
99	Little Rock, N.L.R. Ark.	+	###	+	+
100	Baton Rouge, La.	+	###	###	+

TOP 100 SUMMARY

	<u>NO. of Mkts. Covered Locally</u>	<u>Retail Sales (Add 000)</u>
ABC	88	\$116,335,267
CBS	80	111,837,952
MBS	75	95,380,207
NBC	77	111,438,799

<u>*U.S. MKT. RANK</u>	<u>MARKET</u>	<u>ABC</u>	<u>CBS</u>	<u>MBS</u>	<u>NBC</u>
101	Tucson, Ariz.	+	+	+	+
102	Corpus Christi, Tex.	+	###	+	###
103	Madison, Wisc.	+	+	+	+
104	Erie, Pa.	+	###	###	###
105	Johnstown, Pa.	###	+	+	+
106	Huntington, Ashland, W.Va., KY	###	+	+	+
107	York, Pa.	+	###	###	+
108	Evansville, Ind.	+	+	###	+

+ Markets covered locally    ### Markets not covered

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109	Brockton, Mass.	###	###	###	###
110	Rockford, Ill.	+	###	###	###
111	New London, Norwich, Conn.	###	###	###	###
112	Binghampton, N.Y.	+	+	+	+
113	Brownsville, Harlingen, Tex.	+	+	###	###
114	Portland, Me.	+	+	###	+
115	Scranton, Pa.	###	+	###	+
116	Bristol Johnson City, Tenn.	+	+	+	+
117	Atlantic City, N.J.	+	+	+	###
118	Pensacolo, Fla.	+	###	+	+
119	Newburgh, N.Y.	###	###	###	###
120	Augusta, Ga.	+	+	+	+
121	Columbia, S. Car.	+	+	###	+

*U.S. MKT. RANK	MARKET	ABC	CBS	MBS	NBC
122	Kalamazoo, Mich.	###	+	+	###
123	Austin, Texas	+	+	+	###
124	Amarillo, Texas	+	###	###	###
125	Manchester, N.H.	###	###	###	+
126	Lubbock, Texas	+	+	+	+
127	Winston Salem, N. Car.	###	###	###	+
128	Lakeland, Fla.	###	###	###	+
129	Springfield, Ill.	+	+	###	+
130	Greenville, S. Car.	###	+	+	+
131	Modesto, Calif.	+	###	###	###
132	Saginaw, Mich.	+	+	###	+
133	Savannah, Ga.	###	+	+	+
134	Raleigh, N. Car.	###	###	###	+
135	Montgomery, Ala.	+	+	###	+
136	Lorain Elyria, Ohio	###	###	###	###
137	Hamilton Middletown, Ohio	###	###	###	###
138	Santa Rosa, Calif.	###	###	###	###
139	Jackson, Miss.	+	###	+	+
140	Lincoln, Nebr.	+	###	+	###
141	Boise, Idaho	+	+	+	+
142	Poughkeepsie, N.Y.	+	###	###	###
143	Newport News, Hampton, Va.	###	###	###	###
144	Santa Barbara, Calif.	+	###	###	+
145	Colorado Springs, Colo.	+	+	+	###
146	Charleston, S. Car.	+	+	+	+
147	Ann Arbor, Mich.	###	###	###	###
148	Las Vegas, Nev.	+	+	+	+
149	Macon Ga.	+	+	+	###
150	Ventura Oxnard, Calif.	###	###	+	###

+ Markets covered locally      ### Markets not covered

TOP 150 SUMMARY

	<u>No. of Mkts. Covered Locally</u>	<u>Retail Sales (add 000)</u>
ABC	119	\$122,736,374
CBS	106	117,154,160
MBS	98	99,988,508
NBC	105	117,172,804

<u>*U.S. MKT. RANK</u>	<u>MARKET</u>	<u>ABC</u>	<u>CBS</u>	<u>MBS</u>	<u>NBC</u>
151	Eugene, Oregon	+	+	+	+
152	Cedar Rapids, Iowa	+	+	###	###
153	Columbus, Ga.	+	+	+	+
154	Roanoke, Va.	+	+	+	+
155	Vineland Bridgetown, New Jersey	###	###	###	###
156	Benton Harbor, St. Jos., Mich.	###	###	+	###
157	Yakima, Wash.	+	+	###	+
158	Pittsfield, Massachusetts	+	###	+	###
159	Waco, Texas	+	###	+	###
160	Sioux City, Iowa	+	###	###	###
161	Jamestown, New York	+	###	+	###
162	Muskegon, Musk.Hts., Mich.	+	###	+	###
163	Topeka, Kansas	+	+	+	###
164	Racine, Wisc.	+	###	###	###
165	Daytona Beach, Fla.	+	###	###	###
166	Lexington, Kentucky	+	###	###	###
167	Salem, Oregon	+	###	###	+
168	Battle Creek, Mich.	+	###	###	###
169	Decatur, Ill.	###	+	###	###
170	Green Bay, Wisc.	+	+	+	###
171	Springfield, Ohio	+	###	###	###

*U.S. MKT. RANK	MARKET	ABC	CBS	MBS	NBC
172	Waterloo, Iowa	+	###	+	###
173	Bangor, Maine	+	###	###	+
174	Jackson, Michigan	+	+	###	###
175	Wichita Falls, Texas	###	+	###	###
176	Champaign, Urbana, Ill.	###	+	###	###
177	Asheville, N.C.	+	+	###	+
178	Springfield, Mo.	+	+	###	+
179	Reno, Nev.	+	+	+	+
180	Galveston, Texas	###	###	###	###
181	Altoona, Pa.	+	+	+	###
182	Anderson, Ind.	###	+	+	###
183	Beloit, Janesville, Wisc.	###	###	+	###
184	Joplin, Mo.	###	+	+	###

+ Markets covered locally    ### Markets not covered

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185	Mansfield, Ohio	+	###	###	###
186	Lake Charles, La.	###	###	###	+
187	Elkhart, Ind.	###	###	###	+
188	Pueblo, Colo.	+	###	+	###
189	Hagerstown, Md.	+	+	+	###
190	Sioux Falls, S. Dakota	+	###	###	+
191	Lynchburg, Va.	+	###	+	###
192	Terre Haute, Ind.	+	+	###	###
193	Eau Claire, Wisc.	###	###	+	+
194	Grand Forks, E.G.F., N.D.	###	+	+	###
195	Lima, Ohio	+	###	###	###
196	Odessa, Texas	###	###	+	+
197	Oshkosh, Wisc.	###	###	###	###
198	Appleton, Wisc.	###	###	+	###
199	Durham, N. Car.	+	+	###	###
200	Muncie, Ind.	###	+	###	###



TOP 200 SUMMARY

	<u>No. of Mkts. Covered Locally</u>	<u>Retail Sales (add 000)</u>
ABC	152	\$127,738,130
CBS	128	120,408,143
MBS	121	103,387,452
NBC	119	119,253,978

+ Markets covered locally    ### Markets not covered

\* U.S. Market rank based on total retail sales for Market areas as defined by sales management, "Survey of Buying Power", May 10, 1959.

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ABC RADIO'S 4-MOST MERCHANDISING AND PROMOTION

The National Cigar Institute would have made available to it ABC Radio Network sales promotion and merchandising department to fully coordinate its sales campaign on ABC with its various echelons on the marketing line.

ABC offers its closed circuit facilities to the National Cigar Institute sales staff to regulate its sales efforts regionally.

A merchandising letter would be sent to all distributor outlets apprising them of the Institute's buy and telling how to support the campaign.

ABC's cooperative roster of personalities is happy to pitch in on your merchandising efforts.

A sales promotion kit would be sent to all ABC stations and the National Cigar Institute's major sales groups to help them in driving the benefits of ABC affiliate support at the local level.

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ABC PROPOSALS

ABC Radio offers the National Cigar Institute the following plans for their perusal as an indication of the flexibility, economy, efficiency available to any advertiser.

These plans are by no means the end product we deliver. They are just an indication of the flexibility available. Any combination can be created to form a package which will offer the National Cigar Institute the most efficient buy available in radio today.

In addition to the audience and cost per thousand estimates, an audience composition breakdown of each proposed schedule is included.

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PLAN I.:      SPEAKING OF SPORTS with Howard Cosell

M-F 650-655 PM NYT - Full Sponsorship

Audience and cost estimates show 5,288,000 weekly commercial impressions at a cost per thousand of \$.87. In four weeks over 6,247,000 different listeners would be reached an average of 2.7 each.

PLAN II.:      SPEAKING OF SPORTS with Howard Cosell

Sat/Sun - 10 Broadcasts - Full Sponsorship

Audience and cost estimates show 11,490,000 weekly commercial impressions at a cost per thousand of \$.74. In four weeks over 16,317,000 different listeners would be reached an average of 2.2 each.

PLAN III.:      WEEKDAY NEWS

(A)

M-F 1055-1100 AM NYT - 1 Minute Announcements

Audience and cost estimates show 5,614,000 weekly commercial impressions at a cost per thousand of \$.62. In four weeks over 7,186,000 different listeners would be reached an average of 3.8 each.

(B)

M-F 755-800 PM NYT - Full Sponsorship

Audience and cost estimates show 4,952,000 weekly commercial impressions at a cost per thousand of \$.93. In four weeks over 5,473,000 different listeners would be reached an average of 2.9 each.

PLAN III.: (Cont'd.)

- (D) M-F 755-800 PM NYT and M-F 955-1000 PM NYT - Full Sponsorship
- Audience and cost estimates show 10,144,000 weekly commercial impressions at a cost per thousand of \$.84. In four weeks over 8,791,000 different listeners would be reached an average of 3.7 each.

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- (E) M-F 755-800 PM NYT and M-F 955-1000 PM NYT - 1- Minute Announcements
- Audience and cost estimates show 8,114,000 weekly commercial impressions at a cost per thousand of \$.80. In four weeks over 8,791,000 different listeners would be reached an average of 3.7 each.

PLAN IV.: NEWS ON THE WEEKEND

- (A) Sat/Sun - 8 Broadcasts - Full Sponsorship
- Audience and cost estimates show 9,140,000 weekly commercial impressions at a cost per thousand of \$.81. In four weeks over 11,750,000 different listeners would be reached an average of 2.5 each.
- (B) Sat/Sun - 8 Broadcasts - 1 Minute Announcements
- Audience and cost estimates show 7,311,000 weekly commercial impressions at a cost per thousand of \$.77. In four weeks over 11,750,000 different listeners would be reached an average of 2.5 each.

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NATIONAL CIGAR INSTITUTE  
AUDIENCE COMPOSITION DATA

(Source: Pulse Network Report Feb. 1959)

<u>1. SPEAKING OF SPORTS (M-F)</u>	<u>Percentage of Audience</u>
Men	47%
Women	44%
Teenagers	5%
Children	4%

2. SPEAKING OF SPORTS (Sat/Sun)Percentage of Audience

Men	46%
Women	45%
Teenagers	5%
Children	4%

3. WEEKDAY NEWS (Morning)Percentage of Audience

Men	18%
Women	75%
Teenagers	3%
Children	4%

4. WEEKDAY NEWS (Evening)Percentage of Audience

Men	46%
Women	45%
Teenagers	5%
Children	4%

5. WEEKEND NEWS (Sat/Sun)Percentage of Audience

Men	46%
Women	45%
Teenagers	5%
Children	4%

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Ex. No. 1 KSTP (Cont'd.)

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NATIONAL CIGAR INSTITUTE - PLAN I  
AUDIENCE AND COST/1000 ESTIMATES

Schedule: 5 SPEAKING OF SPORTS with Howard Cosell.  
M-F 650-655 PM NYT - Full Sponsorship

Weekly Cost: \$4625.00

WEEKLY GROSS AUDIENCE ESTIMATES

Per Commercial A.A. Rating	<u>0.7%</u>	<u>#</u>
Number of Commercials Per Week	<u>5</u>	
Weekly Gross Rating Points (Commercial Minute)	<u>4.4%</u>	

	<u>COMMERCIAL MINUTE IMPRESSIONS</u>	<u>COST/1000</u>
HOMES	2,176,000	\$2.13
HOMES + out-of-home*	2,829,000	\$1.63
LISTENERS **	5,288,000	\$ .87

1 & 4 WEEK NET AUDIENCE ESTIMATES \*\*\*

4 week net rating points	<u>5.2%</u>	1 week net rating points	<u>2.5%</u>
HOMES	<u>2,571,000</u>		<u>1,236,000</u>
HOMES + out-of-home*	<u>3,342,000</u>		<u>1,607,000</u>
LISTENERS**	<u>6,247,000</u>		<u>3,004,000</u>
AVERAGE BROADCAST FREQUENCY	<u>2.7</u>		1.4
AVERAGE COMMERCIAL FREQUENCY	<u>3.4</u>		1.8

NOTE: Audience estimated on the basis of Nielsen January-December  
1959  
Comparable Pro-  
gramming

\* Published RAB data, out-of-home increment 30%

\*\* 1.8 In-Home Nielsen Audience Composition Report July-Aug. 1957  
2.1 RAB "Listeners on Wheels" 1956

\*\*\* ~~Estimates based on Nielsen's Cumulative Study~~

#

[73]

**NATIONAL CIGAR INSTITUTE - PLAN II**  
**AUDIENCE AND COST/1000 ESTIMATES**

Schedule: 10 SPEAKING OF SPORTS with Howard Cosell  
 Saturday/Sunday - Full Sponsorship

Weekly Cost \$8500.00

**WEEKLY GROSS AUDIENCE ESTIMATES**

Per Commercial A.A. Rating	0.7%	#
Number of Commercials Per Week	10	
Weekly Gross Rating Points (Commercial Minute)	8.8%	

	<u>COMMERCIAL MINUTE IMPRESSIONS</u>	<u>COST/1000</u>
HOMES	4,352,000	\$1.95
HOMES + out-of-home*	6,093,000	\$1.40
LISTENERS**	11,490,000	\$ .74

**1 & 4 WEEK NET AUDIENCE ESTIMATES\*\*\***

1 week net rating points	6.0%	4 week net rating points	12.5%
HOMES	2,967,000		6,181,000
HOMES + out-of-home*	4,154,000		8,653,000
LISTENERS**	7,833,000		16,317,000
AVERAGE BROADCAST FREQUENCY	1.2		2.2
AVERAGE COMMERCIAL FREQUENCY	1.5		2.8

NOTE: Audience estimated on the basis of Nielson January-Dec 1959

\* Published RAB data, out-of-home increment 40%

\*\* 1.8 In-home Nielson Audience Composition Report July-Aug 1957

2.1 RAB "Listeners on Wheels" 1956

\*\*\* Estimates based on Nielson's Cumulative Study

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Ex. No. 1 KSTP (Cont'd.)

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[74]

NATIONAL CIGAR INSTITUTE - PLAN III (A)AUDIENCE AND COST/1000 ESTIMATES

Schedule: 5 WEEKDAY NEWS - M-F 1055-1100 AM  
1 Minute Participations

Weekly Cost: \$3500.00

WEEKLY GROSS AUDIENCE ESTIMATES

Per Commercial A.A. Rating	<u>1.0%</u>	<u>#</u>
Number of Commercials Per Week	<u>5</u>	
Weekly Gross Rating Points	<u>5.0%</u>	

	<u>COMMERCIAL MINUTE IMPRESSIONS</u>	<u>COST/1000</u>
HOMES	2,473,000	\$1.42
HOMES + out-of-home*	3,215,000	\$1.09
LISTENERS**	5,614,000	\$ .62

1 & 4 WEEK NET AUDIENCE ESTIMATES\*\*\*

1 week net rating points	<u>2.9%</u>	4 week net rating points	<u>6.4%</u>
HOMES	<u>1,434,000</u>		<u>3,165,000</u>
HOMES + out-of-home*	<u>1,864,000</u>		<u>4,115,000</u>
LISTENERS**	<u>3,255,000</u>		<u>7,186,000</u>
AVERAGE BROADCAST FREQUENCY	<u>1.7</u>		<u>3.8</u>

NOTE: Audience estimated on the basis of Nielsen Jan.-Dec. 1959

\* Published RAB data, out-of-home increment 30%

\*\* 1.7 In-home Nielsen Audience Composition Report July-Aug. 1957  
1.9 RAB "Listeners on Wheels" 1956

\*\*\* ~~Estimates based on Nielsen's Consolidated Study~~

#

[75]

NATIONAL CIGAR INSTITUTE - PLAN III (B)AUDIENCE AND COST/1000 ESTIMATESSchedule: 5 WEEKDAY NEWS - M-F 755-800 PM NYT  
Full Sponsorship

Weekly Cost: \$4625.00

WEEKLY GROSS AUDIENCE ESTIMATES

Per Commercial A.A. Rating	<u>0.6%</u>	<u>#</u>
Number of Commercials Per Week	<u>5</u>	
Commercial Minute		
Weekly Gross Rating Points	<u>3.8%</u>	

	<u>COMMERCIAL MINUTE IMPRESSIONS</u>	<u>COST/1000</u>
HOMES	1,879,000	\$2.46
HOMES + out-of-home*	2,537,000	\$1.82
LISTENERS**	4,952,000	\$ .93

1 & 4 WEEK NET AUDIENCE ESTIMATES\*\*\*

1 week net rating points	<u>2.0%</u>	4 week net rating points	<u>4.2%</u>
HOMES	<u>989,000</u>		<u>2,077,000</u>
HOMES + out-of-home*	<u>1,335,000</u>		<u>2,804,000</u>
LISTENERS**	<u>2,606,000</u>		<u>5,473,000</u>

AVERAGE BROADCAST FREQUENCY 1.5 2.9AVERAGE COMMERCIAL FREQUENCY 1.9 3.6

NOTE: Audience estimated on the basis of Nielsen Jan.-Dec. 1959

\* Published RAB data, out-of-home increment 35%

\*\* 1.9 In-home Nielsen Audience Composition Report July-Aug. 1957

2.1 RAB "Listeners on Wheels" 1956

\*\*\* ~~Estimates based on Nielsen's Cumulative Study~~

#

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NATIONAL CIGAR INSTITUTE - PLAN III (C)

AUDIENCE AND COST/1000 ESTIMATES

Schedule: 5 WEEKDAY NEWS - M-F 755-800 PM  
1 Minute Participations

Weekly Cost: \$3500.00

WEEKLY GROSS AUDIENCE ESTIMATES

Per Commercial A.A. Rating		<u>0.6%</u>	<u>#</u>
Number of Commercials Per Week		<u>5</u>	
Weekly Gross Rating Points		<u>3.0%</u>	
	<u>COMMERCIAL MINUTE</u>		<u>COST/1000</u>
	<u>IMPRESSIONS</u>		
HOMES	1,484,000		\$2.36
HOMES + out-of-home*	2,003,000		\$1.75
LISTENERS**	3,910,000		\$ .90

1 & 4 WEEK NET AUDIENCE ESTIMATES\*\*\*

1 week net rating points	<u>2.0%</u>	4 week net rating points	<u>4.2%</u>
HOMES	<u>989,000</u>		<u>2,077,000</u>
HOMES + out-of-home**	<u>1,335,000</u>		<u>2,804,000</u>
LISTENERS**	<u>2,606,000</u>		<u>5,473,000</u>

AVERAGE BROADCAST FREQUENCY 1.5 2.9

NOTE: Audience estimated on the basis of Nielsen Jan. - Dec. 1959

\* Published RAB data, out-of-home increment 35%

\*\* 1.9 In-home Nielsen Audience Composition Report July-Aug. 1957  
2.1 RAB "Listeners on Wheels" 1956

\*\*\* ~~Estimates based on Nielsen's Cumulative Study~~

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[77]

NATIONAL CIGAR INSTITUTE - PLAN III (D)AUDIENCE AND COST/1000 ESTIMATES

Schedule: 10 WEEKDAY NEWS - M-F 755-800 PM/955-1000 PM  
Full Sponsorship

Weekly Cost: \$8500.00

WEEKLY GROSS AUDIENCE ESTIMATES

Per Commercial A.A. Rating

0.6%Number of Commercials Per Week  
Commercial Minute10

Weekly Gross/Rating Points

7.5%

	<u>COMMERCIAL MINUTE IMPRESSIONS</u>	<u>COST/1000</u>
HOMES	3,709,000	\$2.29
HOMES + out-of-home**	5,007,000	\$1.70
LISTENERS**	10,144,000	\$ .84

1 & 4 WEEK NET AUDIENCE ESTIMATES\*\*\*1 week net rating  
points3.1%4 week net rating points 6.5%

HOMES

1,533,0003,214,000

HOMES +

out-of-home\*

2,070,0004,339,000

LISTENERS\*\*

4,194,0008,791,000

AVERAGE BROADCAST FREQUENCY

1.93.7

AVERAGE COMMERCIAL FREQUENCY

2.44.6

NOTE: Audience estimated on the basis of Nielsen January-Dec. 1959

\* Published RAB data, out-of-home increment 35%

\*\* 2.0 In-home Nielsen Audience Composition Report July-Aug. 1957

2.1 RAB "Listeners on Wheels" 1956

\*\*\* ~~Estimates based on Nielsen's Cumulative Study~~

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Ex. No. 1 KSTP (Cont'd.)

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NATIONAL CIGAR INSTITUTE - PLAN III (E)AUDIENCE AND COST/1000 ESTIMATES

Schedule: 10 WEEKDAY NEWS - M-F 755-800 PM/955-1000 PM  
1 Minute Participations

Weekly Cost: \$6500.00

WEEKLY GROSS AUDIENCE ESTIMATES

Per Commercial A.A. Rating	0.6%	#
Number of Commercials Per Week	10	
Weekly Gross Rating Points	6.0%	

	<u>COMMERCIAL MINUTE IMPRESSIONS</u>	<u>COST/1000</u>
HOMES	2,967,000	\$2.19
HOMES + out-of-home*	4,005,000	\$1.62
LISTENERS**	8,114,000	\$ .80

1& 4 WEEK NET AUDIENCE ESTIMATES\*\*\*

1 week net rating points	<u>3.1%</u>	4 week net rating points <u>6.5%</u>
HOMES	<u>1,533,000</u>	<u>3,214,000</u>
HOMES + out-of-home*	<u>2,070,000</u>	<u>4,339,000</u>
LISTENERS**	<u>4,194,000</u>	<u>8,791,000</u>

AVERAGE BROADCAST FREQUENCY                      1.9                      3.7

NOTE: Audience estimated on the basis of Nielsen January-Dec. 1959

\* Published RAB data, out-of-home increment 35%

\*\* 2.0 In-home Nielsen Audience Composition Report July-Aug. 1957  
2.1 RAB "Listeners on Wheels" 1956

\*\*\* ~~Estimates based on Nielsen's Cumulative Study~~

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NATIONAL CIGAR INSTITUTE - PLAN IV (A)AUDIENCE AND COST/1000 ESTIMATES

Schedule: 8 NEWS ON THE WEEKEND

Saturday/Sunday - Full Sponsorship

Weekly Cost: \$7,400.00

WEEKLY GROSS AUDIENCE ESTIMATES

Per Commercial A.A. Rating	0.7%	#
Number of Commercials Per Week	8	
Commercial Minute		
Weekly Gross / Rating Points	7.0%	
	<u>COMMERCIAL MINUTE</u>	<u>COST/1000</u>
	<u>IMPRESSIONS</u>	
HOMES	3,462,000	\$2.14
HOMES +		
out-of-home*	4,847,000	\$1.53
LISTENERS**	9,140,000	\$ .81

1 & 4 WEEK NET AUDIENCE ESTIMATES\*\*\*

1 week net rating		4 week net rating points	9.0%
points	4.3%		
HOMES	2,126,000	4,451,000	
HOMES +			
out-of-home*	2,976,000	6,231,000	
LISTENERS**	5,612,000	11,750,000	

1 & 4 WEEK NET AUDIENCE ESTIMATES\*\*\*

1 week net rating		4 week net rating points	9.0%
points	4.3%		
HOMES	2,126,000	4,451,000	
HOMES +			
out-of-home*	2,976,000	6,231,000	
LISTENERS**	5,612,000	11,750,000	

AVERAGE BROADCAST FREQUENCY 1.3 2.5AVERAGE COMMERCIAL FREQUENCY 1.6 3.1NOTE: Audience estimated on the basis of Nielsen Jan-Dec. 1959  
Comparable Programming

- \* Published RAB data, out-of-home increment 40%
- \*\* 1.8 In-home Nielsen Audience Composition Report July-Aug. 1957
- \*\*\* 2.1 RAB "Listeners on Wheels" 1956
- \*\*\* Excludes sponsored and unsponsored advertising study



NATIONAL CIGAR INSTITUTE - PLAN IV (B)

AUDIENCE AND COST/1000 ESTIMATES

Schedule: 8 NEWS ON THE WEEKEND

Saturday/Sunday - 1 Minute Participations

Weekly Cost: \$5600.00

WEEKLY GROSS AUDIENCE ESTIMATES

Per Commercial A.A. Rating	0.7%	#
Number of Commercials Per Week	8	
Commercial Minute		
Weekly Gross/Rating Points	5.6%	
	<u>COMMERCIAL MINUTE</u>	<u>COST/1000</u>
	<u>IMPRESSIONS</u>	
HOMES	2,769,000	\$2.02
HOMES +		
out-of-home*	3,877,000	\$1.44
LISTENERS**	7,311,000	\$ .77

1 & 4 WEEK NET AUDIENCE ESTIMATES\*\*\*

1 week net rating		4 week net rating points	
points	<u>4.3%</u>		<u>9.0%</u>
HOMES	<u>2,126,000</u>		<u>4,451,000</u>
HOMES +			
out-of-home*	<u>2,976,000</u>		<u>6,231,000</u>
LISTENERS**	<u>5,612,000</u>		<u>11,750,000</u>
AVERAGE BROADCAST FREQUENCY	<u>1.3</u>		<u>2.5</u>

NOTE: Audience estimated on the basis of Nielsen Jan-Dec. 1959  
Comparable Programming

\* Published RAB data, out-of-home increment 40%

\*\* 1.8 In-home Nielsen Audience Composition Report July-Aug. 1957  
2.1 RAB "Listeners on Wheels" 1956

\*\*\* ~~Estimates based on Nielsen's Cumulative Study~~

#

KSTP, Inc. #2

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FEDERAL COMMUNICATIONS COMMISSION

Docket No. 6584 *mal*

EXHIBIT No. 2 KSTP

Date 1/22/62

Reporter Garro



50,000 watts - 770 KC  
NEW YORK, N.Y.  
ABC

WABC -- New York's first station -- is owned and operated by the American Broadcasting Company. With 50,000 watts clear channel non-directional, on 770 kilocycles, WABC covers the most heavily populated area in the United States. Well over 22 million people live within the WABC 0.5 mv/m area.

This area is the busiest, richest market in the world for every type of goods and services, with an effective buying income of nearly 50 billion dollars

WABC, with its carefully chosen personality programs, reaches this great potential with personalized, local salesmanship. The personalities are nationally known entertainment figures, yet they sell the WABC market with a sales approach tailored to the realities and tastes of the greater New York metropolitan area.

WABC's new 50,000 watt transmitter beams a more effective and efficient signal than ever before. It is ideally located at Lodi, New Jersey, only 10 miles from Times Square, closer to mid-Manhattan, than any other network station's transmitter.



0.5 mv/m Contour

Copyright Mapstrom Company, Inc., Mapmakers, N. Y. 7, N. Y.

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EXHIBIT NO. 101 WABC

ENGINEERING REPORT  
WABC, NEW YORK, N. Y.  
(770KC, 50KW, U 1-A)

DOCKET 6584

DOCKET 14225

American Broadcasting-Paramount Theatres, Inc.

December 1961

\* \* \* \* \*

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AFFIDAVIT

CITY OF WASHINGTON }  
DISTRICT OF COLUMBIA } SS

Frank G. Kear, having been duly sworn, deposes and says:

1. That he is a qualified engineer engaged in consulting engineering in the City of Washington, District of Columbia; that he has been granted registration to practice as a Professional Engineer in the District of Columbia; that he is a member of the firm of Kear and Kennedy, and that his qualifications are a matter of record with the Federal Communications Commission.

2. That the firm of Kear and Kennedy has been retained by American Broadcasting-Paramount Theatres, Inc., licensee of Station WABC, New York, New York (770KC, 50KW-U, BR-167), for the preparation of certain engineering material in connection with the WABC/KOB hearings, Docket No. 6584 (KSTP, Inc. KOB, Albuquerque, New Mexico, BMP-1738) and Docket 14225 (WABC, BR-167).

3. That he has prepared or caused to be prepared under his immediate supervision the attached engineering statement and exhibits in accordance with the FCC Rules Governing Radio Broadcast Services.

4. That the foregoing statements and the aforementioned exhibits which are attached to and form part of this report are true and correct of his own knowledge except such statements as are on information and belief, and as to such statements, he believes them to be true.

/s/ Frank G. Kear

[JURAT - Dated Dec. 12, 1961]

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ENGINEERING STATEMENT

This engineering report has been prepared on behalf of American Broadcasting-Paramount Theatres, Inc., licensee of Station WABC, New York, New York (770 kc, 50 kw-U, BR-167) relative to certain issues in the WABC/KOB hearings, Docket No. 6584 (KSTP, Inc. KOB, Albuquerque, New Mexico, BMP-1738) and Docket No. 14225 (WABC, BR-167).

The engineering contained herein consists essentially of a series of exhibits in the form of maps (with attached population and area summaries, where pertinent) which depict or portray the primary and secondary nighttime service areas of Station WABC operating with presently licensed facilities as the dominant Class I-A station on 770 kc, utilizing a non-directional antenna, unlimited hours and, in addition, the service areas of WABC operating as a Class I-B station using a directional antenna at night with a power of 50 kw being assumed for both types of operation.

The exhibits referred to above illustrate the areas lost by WABC, both primary and secondary nighttime service, in the event WABC were to operate as a Class I-B station with a directional antenna nighttime, assuming the mode of operation whereby both WABC and KOB utilize directional antennas at night (Class I-B) affording mutual protection to each other.

Figure 1 is a comparison of the 0.5 mv/m 50 per cent secondary service contours of Station WABC, operating with a non-directional

antenna and with a directional antenna. The shaded area between contours of WABC denotes the area that would be lost to WABC, by virtue of directional operation.

The service contours of WABC, both primary and secondary, are identical with the WABC contours as illustrated in the KOB Engineering Report (D-6584/6585, September 1956).

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Figure 2 illustrates the secondary service contours for WABC for directional and non-directional operation and the shaded portion indicates the area between the WABC secondary service contours which receive interference free primary nighttime service. The white or unshaded portion reflects areas not receiving primary nighttime service. Figure 2 was derived from Figure 3 which portrays the primary nighttime contours of various stations in the WABC secondary differential area. A Population and Area Summary is attached to the above-mentioned exhibit.

The nighttime service contours of other stations as depicted on exhibits in this report are the contours of unlimited time commercial broadcast stations rendering service in the WABC primary and secondary service differential areas.

It should be noted that the holes created in the WABC secondary service area by Stations WBBM, Chicago, Illinois (780 kc) and WJR, Detroit, Michigan (760 kc) as shown on exhibits in this report reflect adjacent channel interference from these stations (1/4 skywave/ground-wave).

Figure 4 illustrates the ABC (American Broadcasting Company) secondary services (0.5 mv/m, 50 per cent) in the WABC differential area as portrayed on Figure 2. Similarly, Figure 5 shows the CBS (Columbia Broadcasting System) secondary services, Figure 6 the MBS (Mutual Broadcasting System) services, Figure 7 the NBC (National Broadcasting Company) services, and Figure 8 denotes the West-

inghouse stations providing secondary service to the WABC differential area.

Figure 9 illustrates the secondary service contours of WABC and the ABC interference free primary nighttime service in the WABC differential area. Likewise, Figure 10 illustrates the CBS primary nighttime services, Figure 11 the MBS primary nighttime services, Figure 12 the NBC services

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and Figure 13 the Westinghouse primary interference free nighttime facilities in the secondary differential area.

Figure 14 portrays the WABC primary nighttime contours for directional and non-directional operation and illustrates the gain and loss areas by shading. A Population and Area Summary is attached to this exhibit.

Figures 15, 16, 17 and 18 depict the respective ABC, CBS, MBS and NBC primary nighttime services in the WABC primary differential area.

In considering operating facilities and network affiliations of the various stations as illustrated on the foregoing exhibits, a cutoff date of January 10, 1961, was assumed.

With particular reference to network affiliations, the affiliations of stations were determined by referring to the January 10, 1961, issue of "Network Rates and Data", which is published by Standard Rate and Data Service, Inc., Skokie, Illinois. This publication lists the stations having network affiliations.

In the case of stations having dual network affiliations, an effort was made to determine the basic affiliation of a particular station insofar as possible. If the basic affiliation was learned for the particular station in question, the station was portrayed on exhibits only for its basic affiliation, otherwise; in the case of dual affiliations, the station was depicted on both network exhibits.



As an example of determination of basic network affiliations, stations WBAP-WFAA (when operating on 820 kc), Dallas-Fort Worth, Texas, and Station WLW, Cincinnati, Ohio, were listed in "Standard Rates and Data", as having both NBC and ABC affiliations, however; inquiry disclosed that all three stations were basic NBC affiliates.

In preparing the engineering exhibits contained in this report, the ground rules as set out in the WABC/KOB stipulation No. 1 (1956) were

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adhered to in the determination of coverage, populations, areas, etc. Use was also made of data, where pertinent and applicable, which was contained in the engineering reports submitted on behalf of Station KOB, Docket No. 6584 and Docket No. 6585, relating to issues in the Commission's Order, FCC 55-624, dated May 26, 1956, and prepared in September 1956. This information is a matter of record and is on file with the Commission.

Since there were a number of changes in operating facilities, etc., of various stations as outlined in the original Dockets No. 6584 and No. 6585, (September 1956), and since there were a number of new stations authorized in the interim, the data originally submitted was brought up to date with changes and additions being incorporated where necessary.

Facilities of stations were determined by reference to the Commission's Official Notification List for Standard Broadcast Stations and contours, night limits, etc., were either determined from data on file with the Commission or were calculated in accordance with the Commission's Rules and the WABC/KOB stipulations.

Groundwave contours were calculated using efficiencies determined from the Commission's Notification list, or from Figure 8 of the Rules. In the case of stations with directional arrays, the measured pattern, if available, was used in calculating coverage. The ground

conductivities were determined by reference to the M-3 Conductivity Map.

It should be noted that local stations in the WABC secondary differential area are identified by a small circle or dot. This is the same procedure used previously for Locals in the WABC/KOB Hearings (September, 1956, D-6584/6585).

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Figure 19 is an illustration of the 2.24 mv/m coverage of Station KOB operating as a Class II station at night with protection being afforded the nighttime secondary service of WABC operating as a Class I-A (ND) station. This contour was based on the directional antenna pattern depicted on Plate 13-A of the KOB report of September, 1956 (D-6584/6585).

The interference free primary nighttime coverage of other stations in the KOB 2.24 mv/m interference free primary nighttime service area is portrayed on Figure 19.

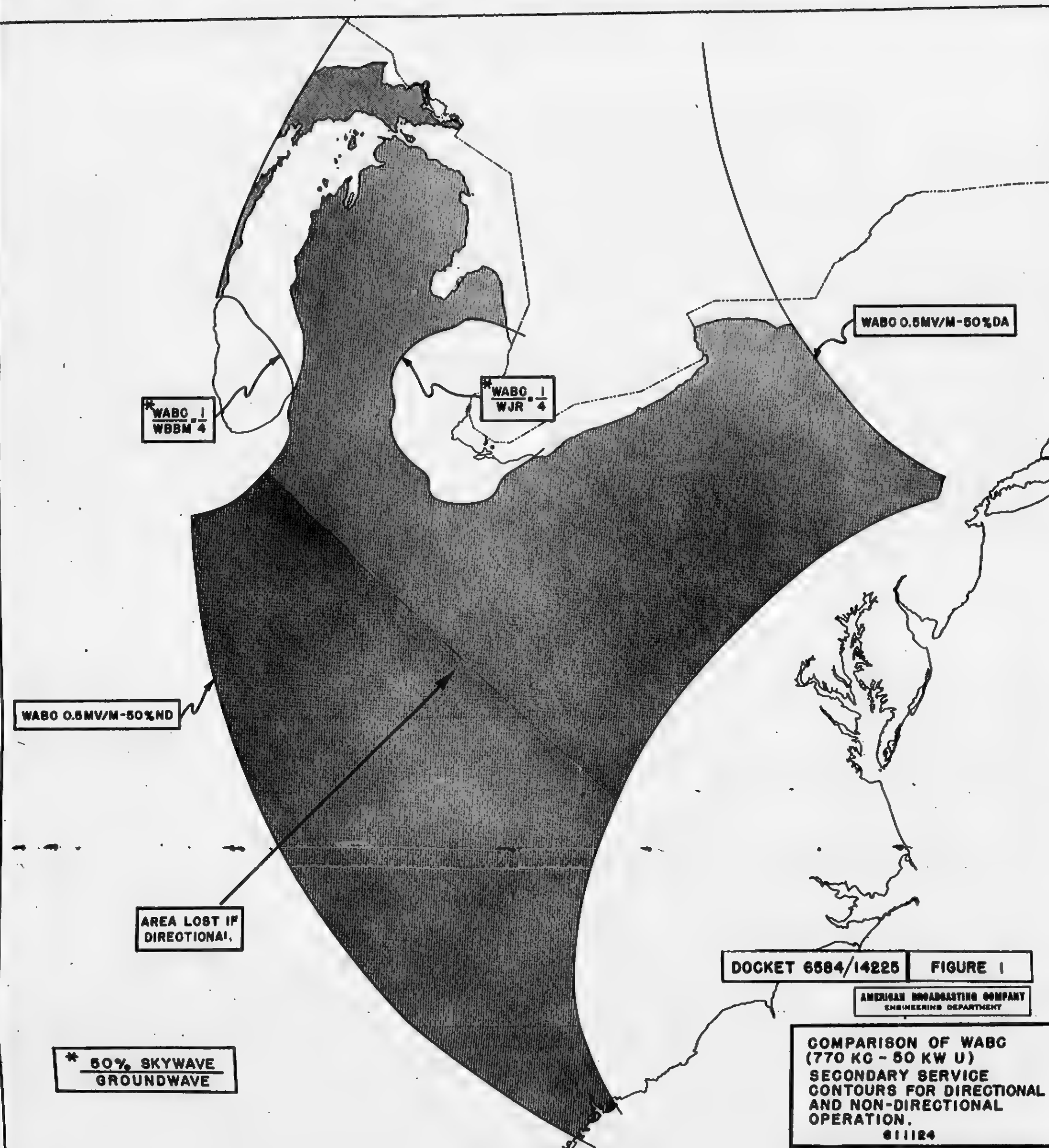
Figure 20 is a comparison of the primary nighttime service of KOB operating as a Class I-B station and as a Class II station as illustrated on Figure 19. The Class I-B coverage of KOB was based on the directional antenna pattern of Plate 9A, Figure 1, of the September 1956 KOB engineering report (D-6584/6585). The primary nighttime service of other stations is also illustrated on Figure 20. A population and Area Summary for the two modes of operation for KOB is attached for reference.

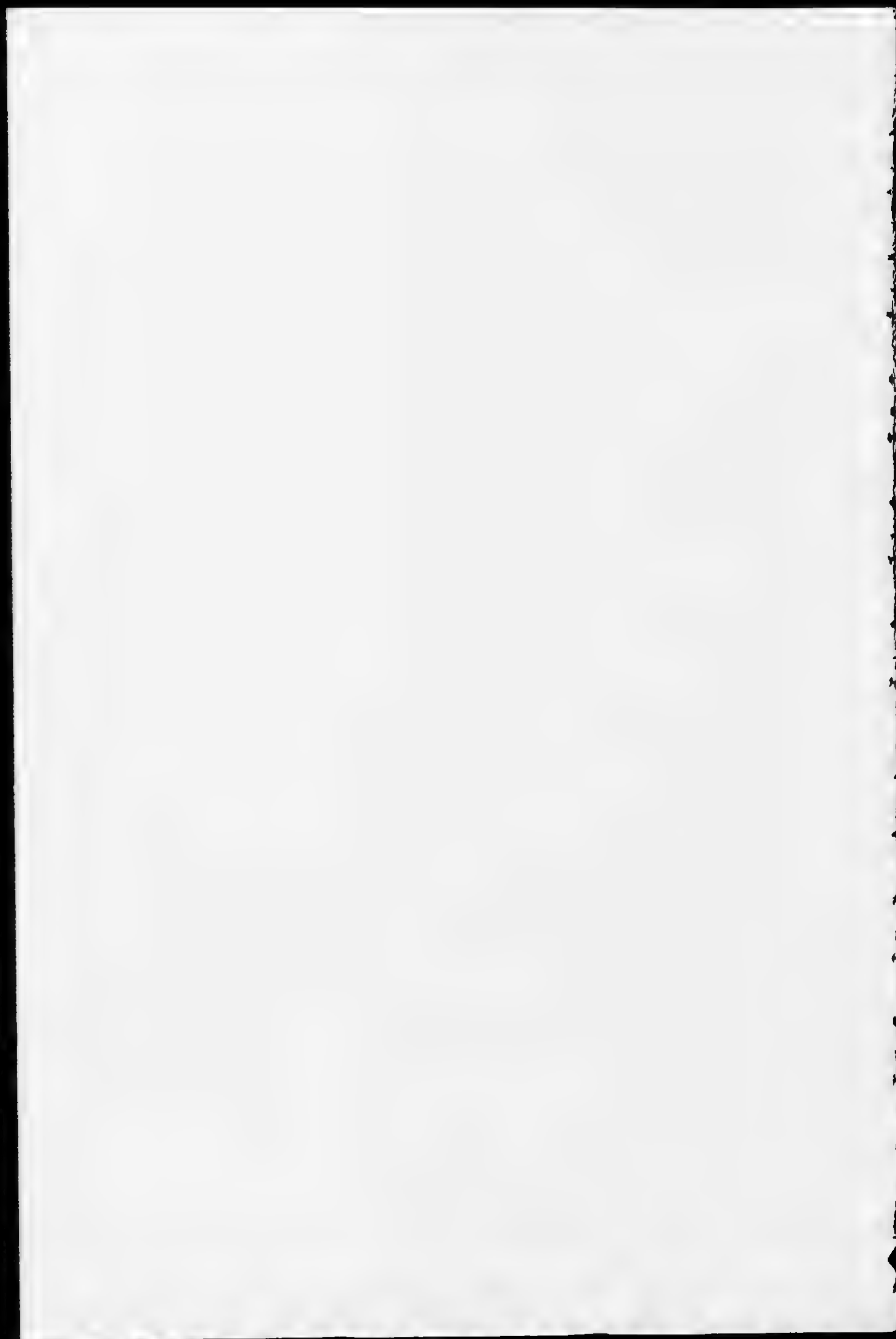
All populations were determined by reference to the 1960 U. S. Census Reports and areas were determined using a planimeter.

The engineering contained in this report has been prepared in accordance with the Commission's Rules Governing Radio Broadcast Services and Stipulation No. 1 (D-6584/6585).

11X14

1073-1074





SUMMARY OF POPULATION ANDAREA DATA FOR FIGURE I

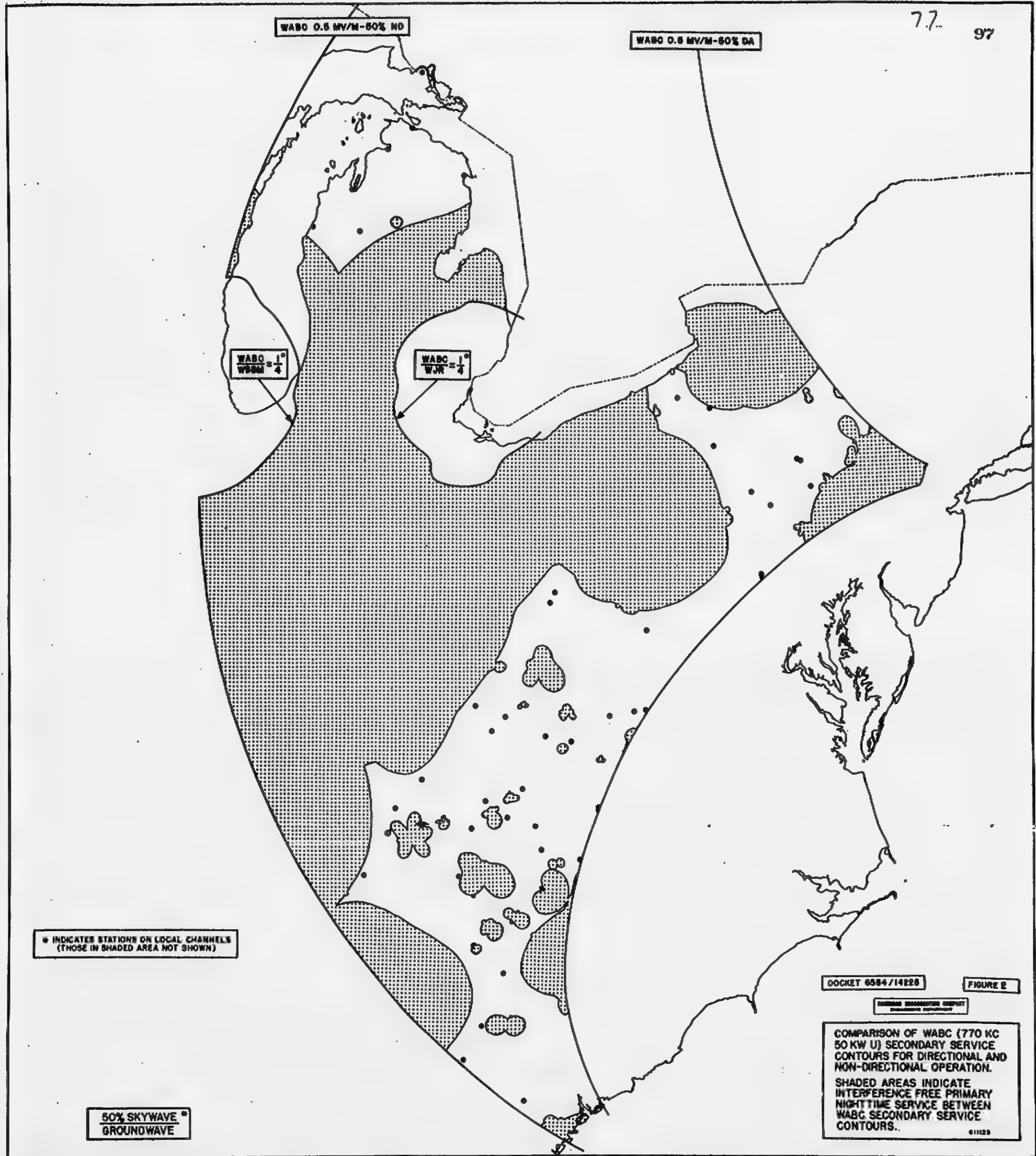
## WABC Non-Directional Operation

<u>Nighttime</u>	<u>Population</u>	<u>Area (Sq. Miles)</u>
Primary Ground Wave Service (0.5 MV/M)	17,707,715	19,270
Secondary Service (0.5 MV/M 50%)	<u>24,957,798</u>	<u>489,210</u>
Total Primary and Secondary Service	42,665,513	508,480

## WABC Directional Operation

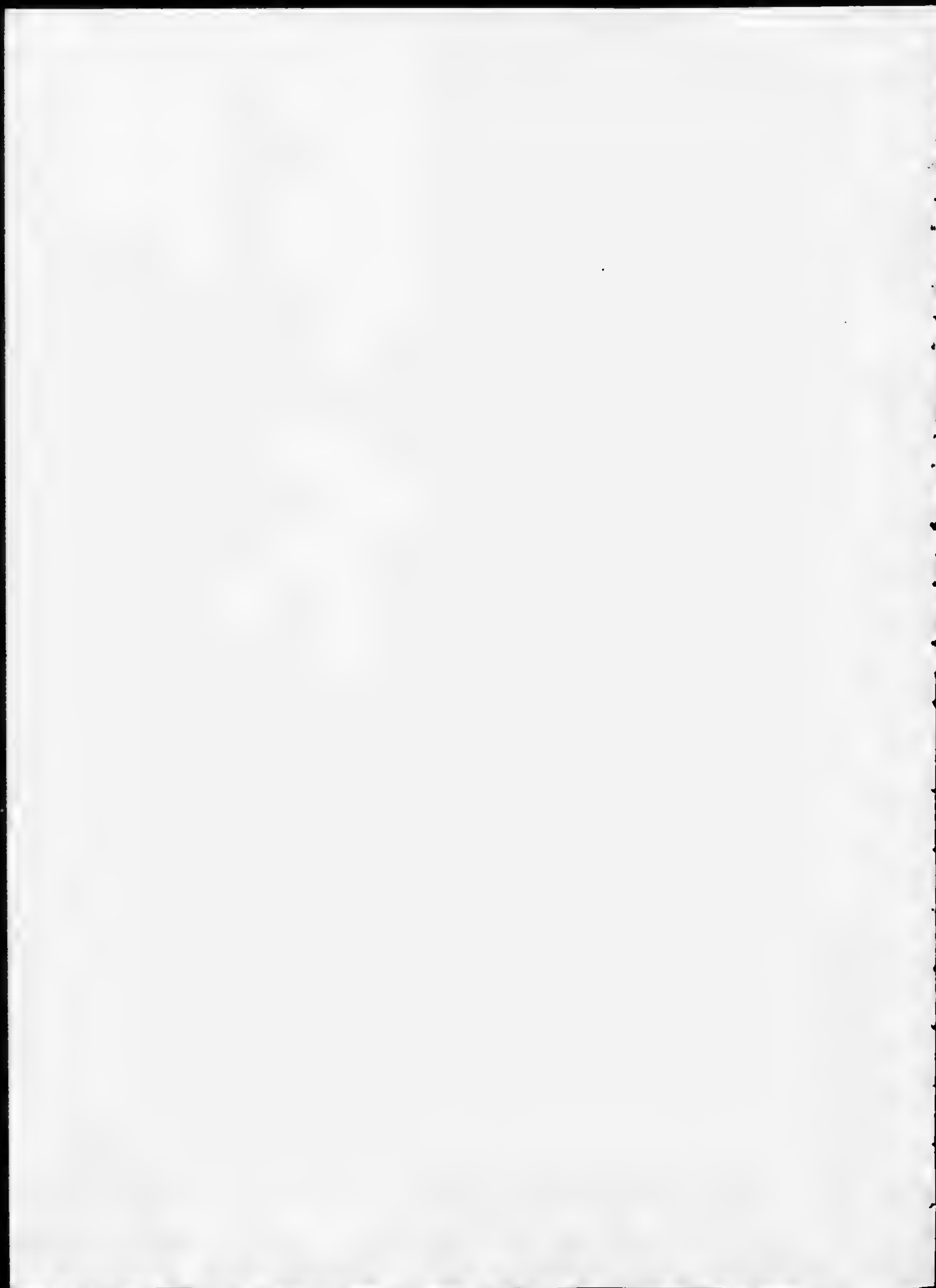
<u>Nighttime</u>	<u>Population</u>	<u>Area (Sq. Miles)</u>
Primary Ground Wave Service (0.5 MV/M)	17,005,389	15,410
Secondary Service (0.5 MV/M 50%)	<u>7,743,950</u>	<u>197,770</u>
Total Primary and Secondary Service	24,749,339	213,180
WABC Primary (ND)	17,707,715	19,270
WABC Primary (DA)	<u>17,005,389</u>	<u>15,410</u>
Difference	702,326	3,860
WABC Secondary (ND)	24,957,798	489,210
WABC Secondary (DA)	<u>7,743,950</u>	<u>197,770</u>
Difference	<u>17,213,848</u>	<u>291,440</u>











POPULATION AND AREA SUMMARYFOR FIGURE 2

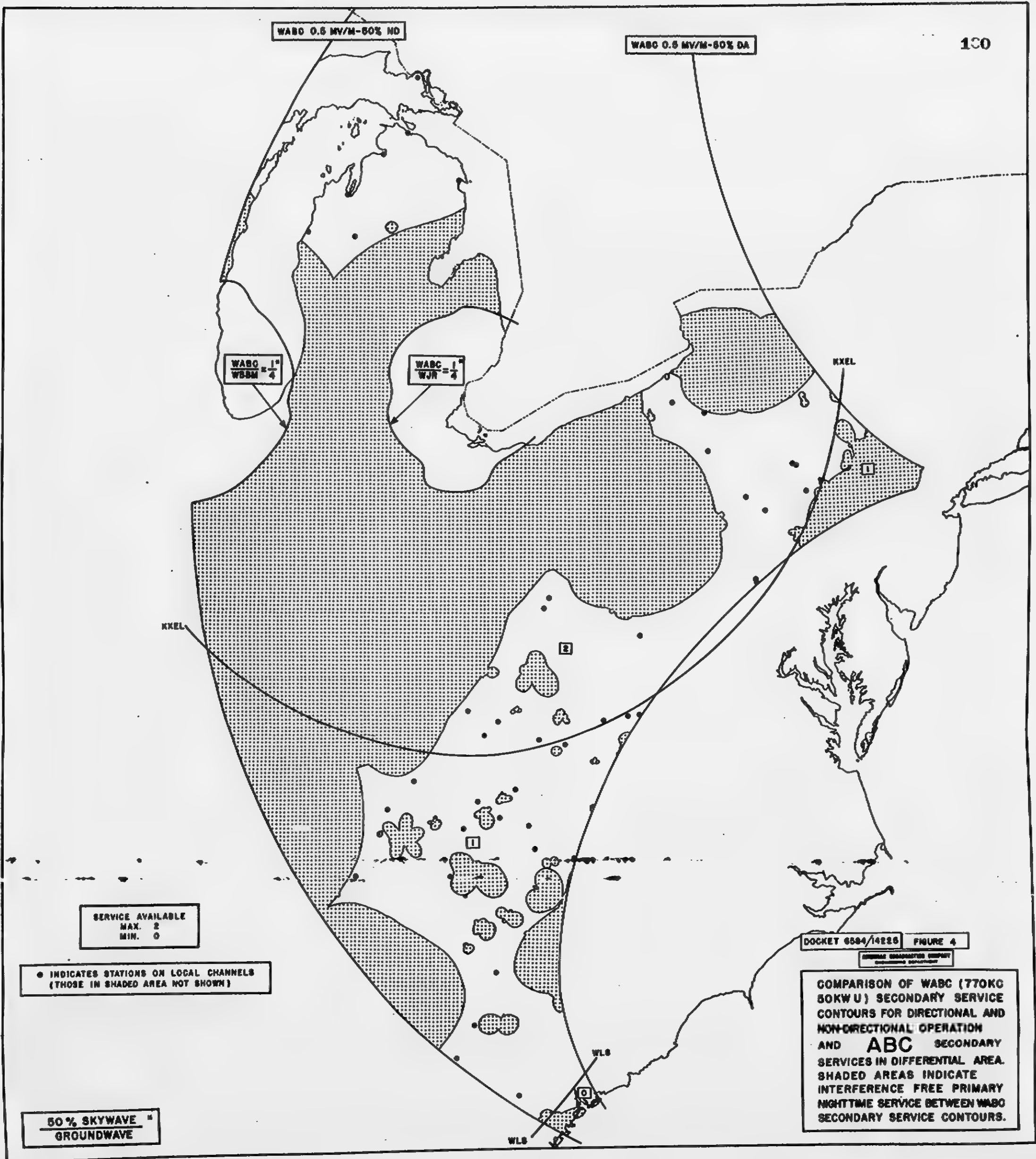
Area between WABC secondary service contours without nighttime  
primary service:

Population

5,667,808

Area (sq. mi.)

113,701



SERVICE AVAILABLE  
MAX. 2  
MIN. 0

• INDICATES STATIONS ON LOCAL CHANNELS  
(THOSE IN SHADED AREA NOT SHOWN)

50% SKYWAVE  
GROUNDWAVE

DOCKET 8884/14225 FIGURE 4

COMPARISON OF WABC (770KC  
50KW U) SECONDARY SERVICE  
CONTOURS FOR DIRECTIONAL AND  
NON-DIRECTIONAL OPERATION  
AND ABC SECONDARY  
SERVICES IN DIFFERENTIAL AREA.  
SHADED AREAS INDICATE  
INTERFERENCE FREE PRIMARY  
NIGHTTIME SERVICE BETWEEN WABC  
SECONDARY SERVICE CONTOURS.

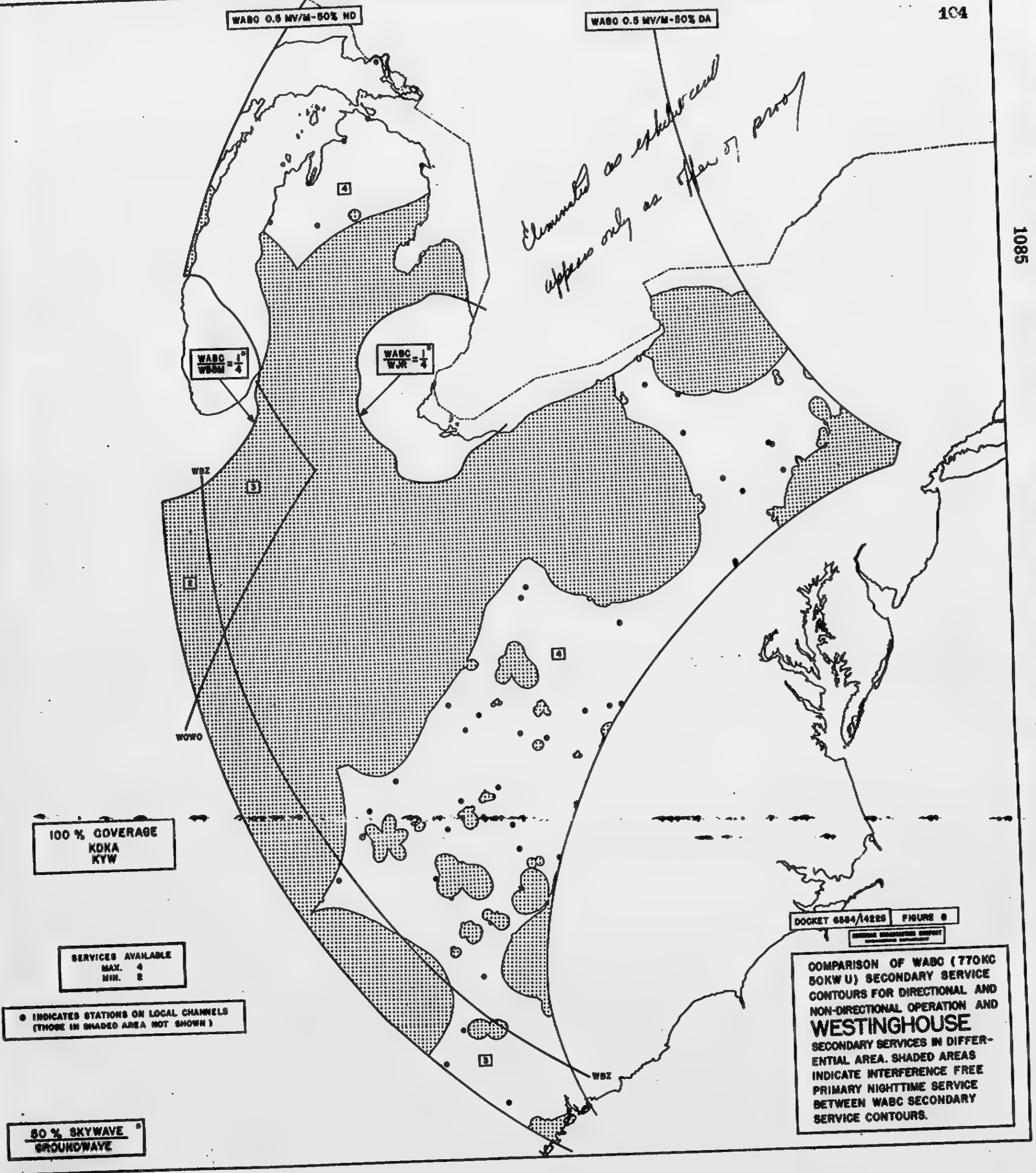




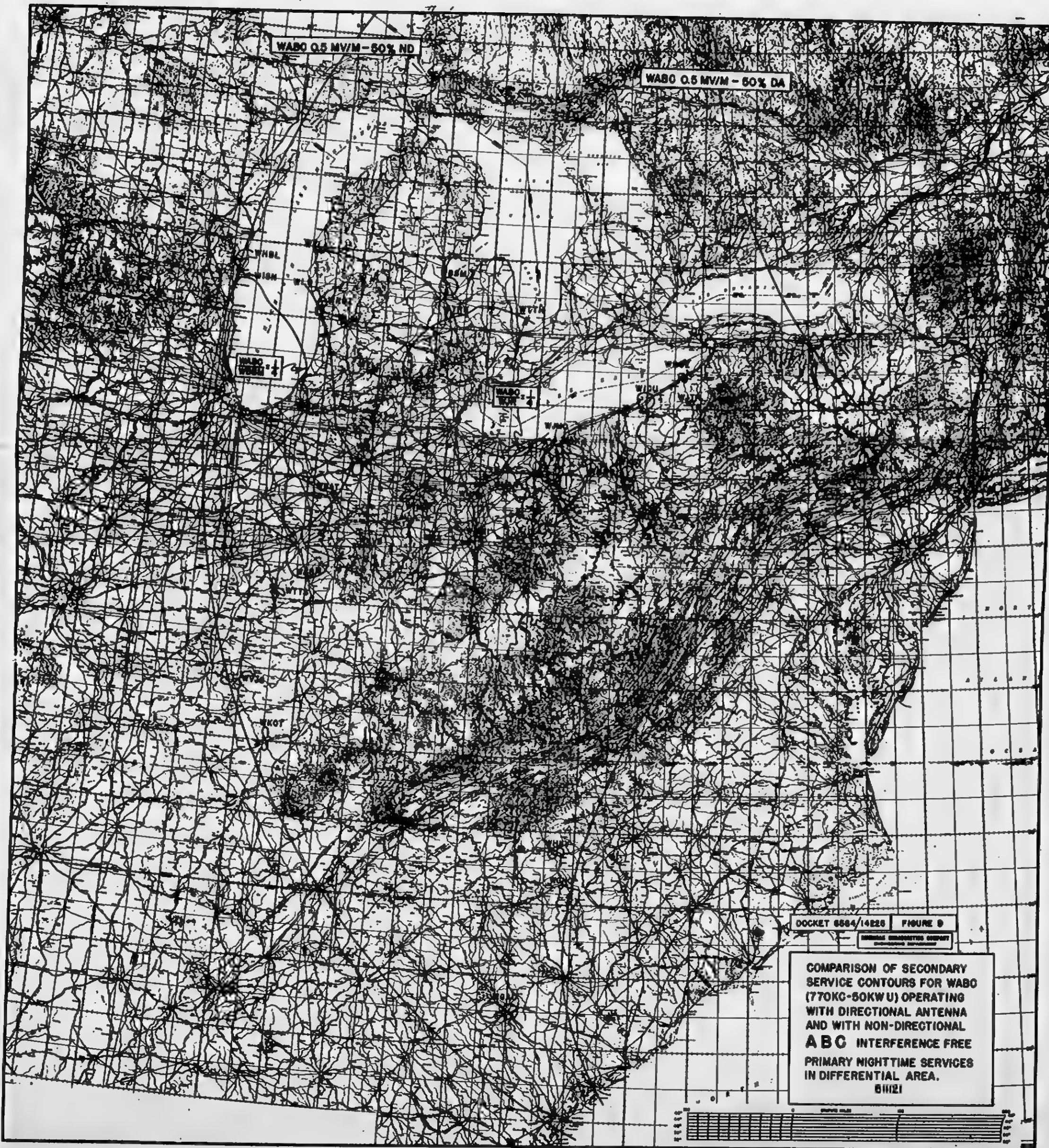




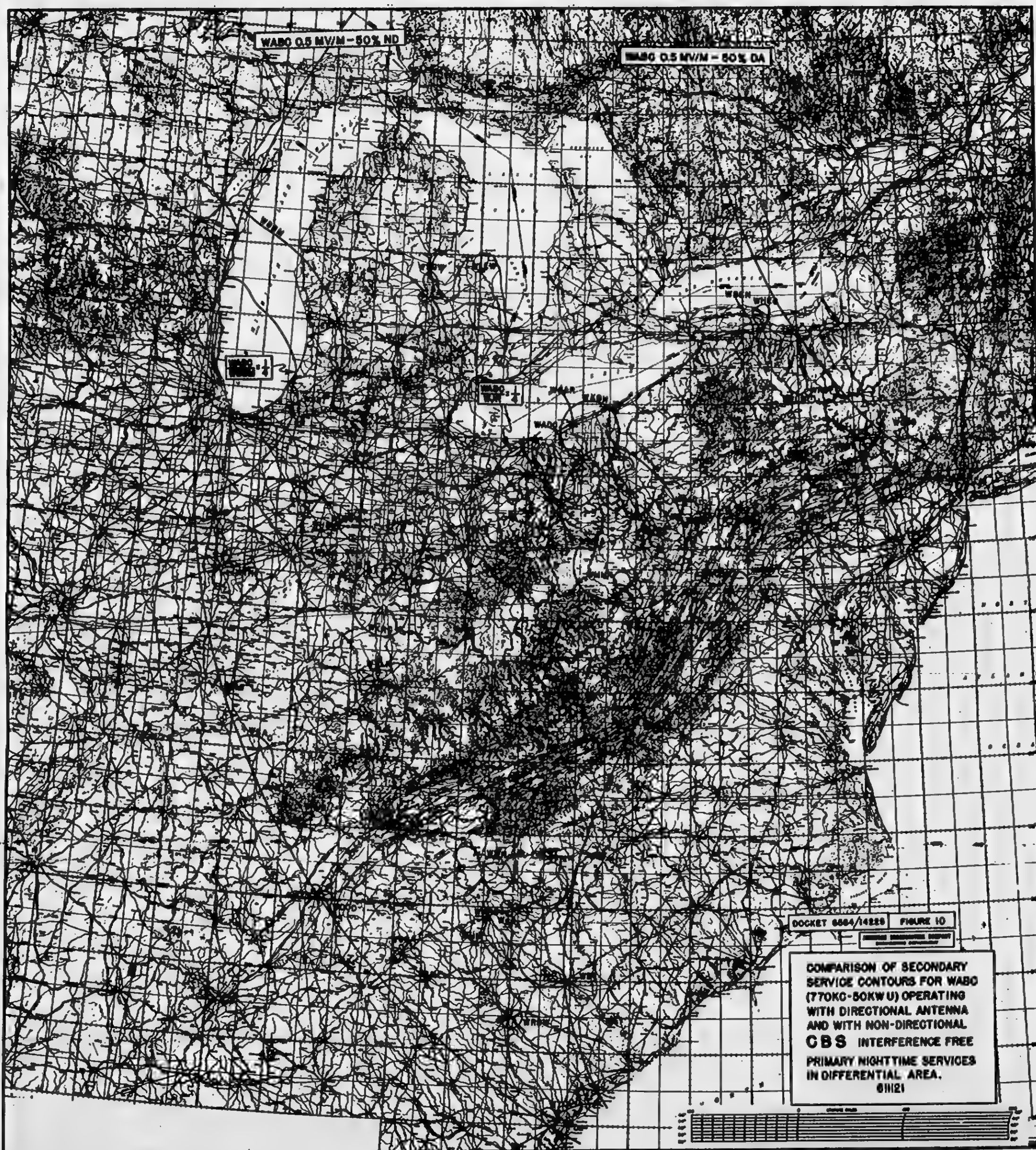




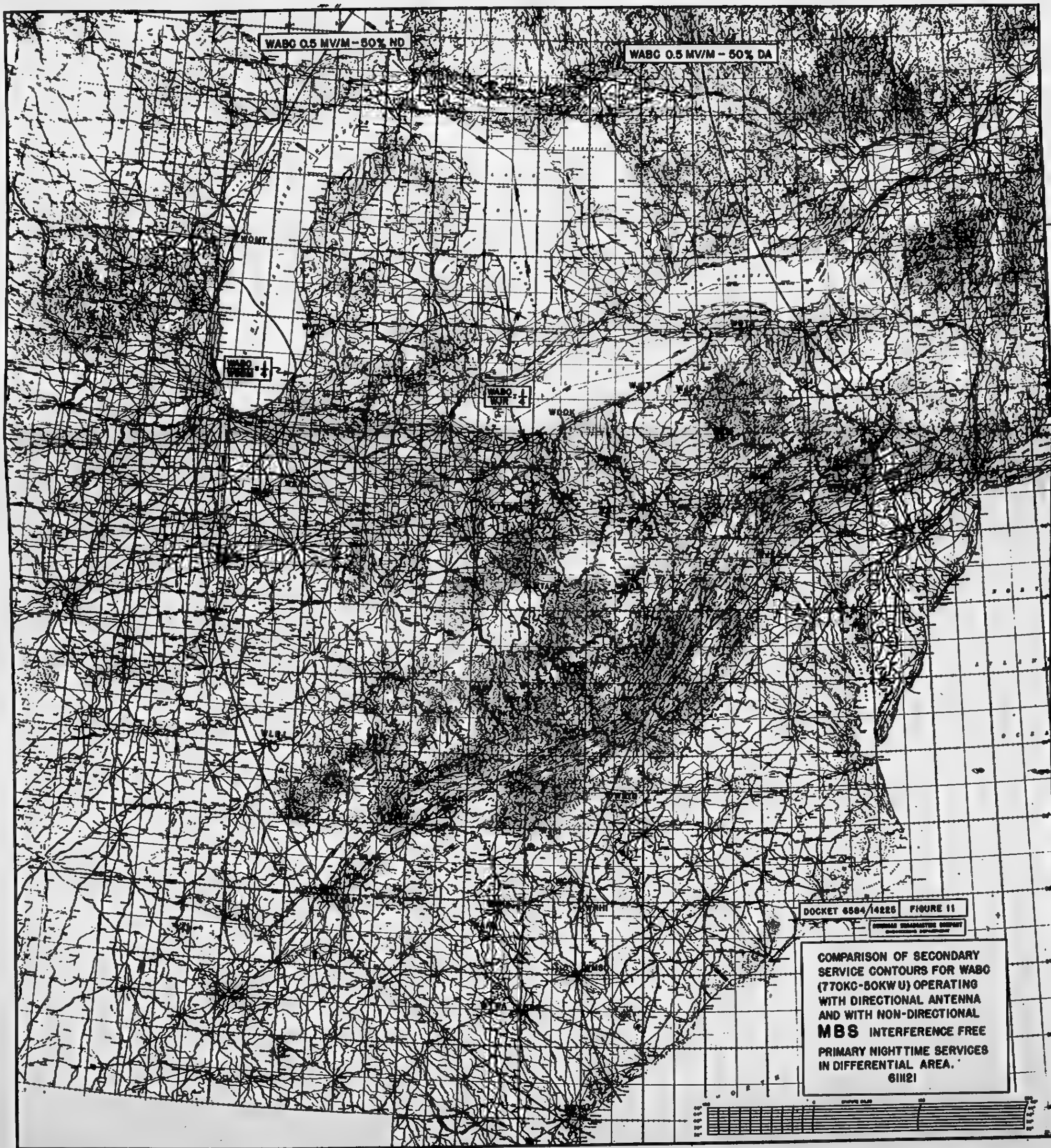




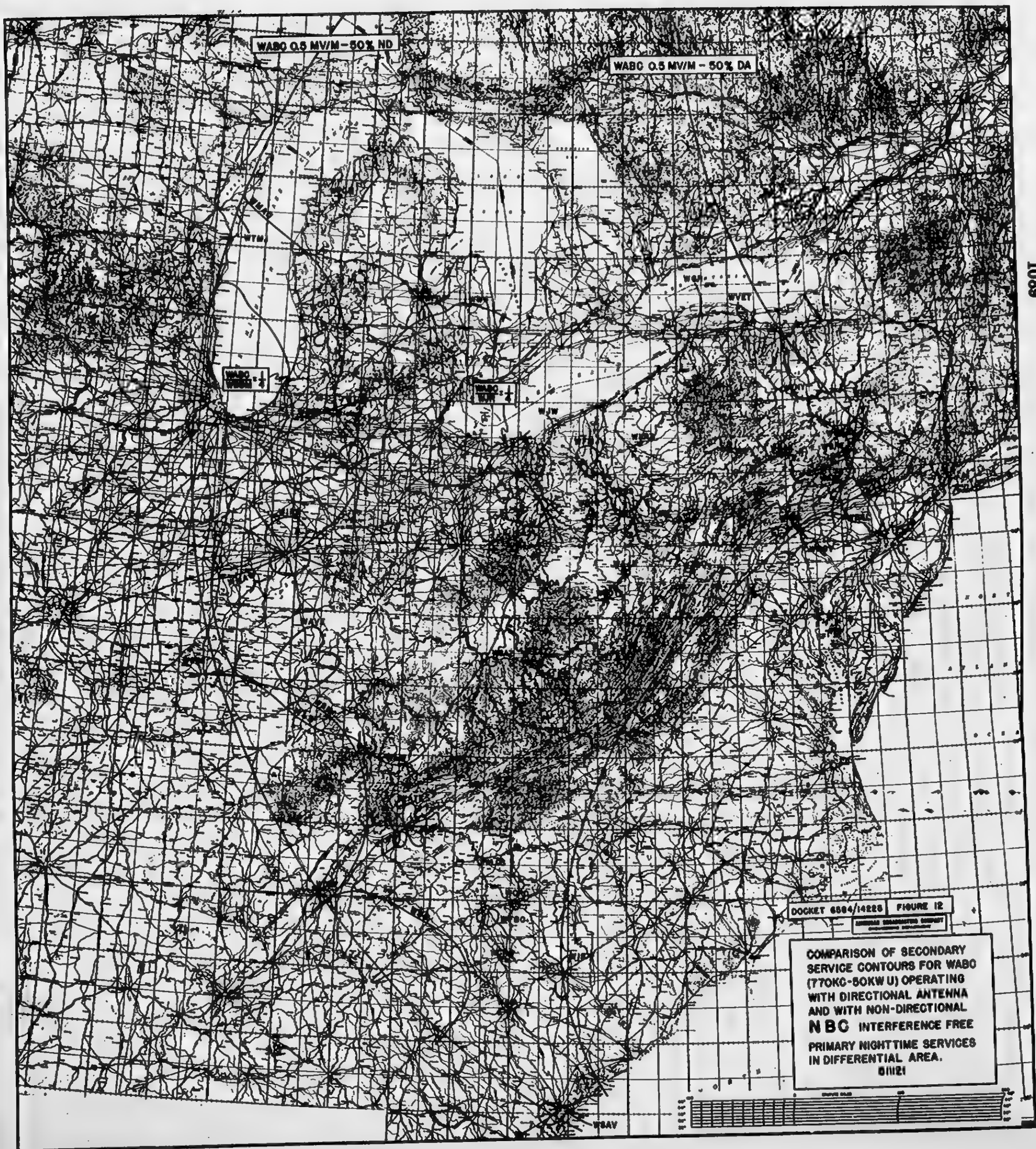






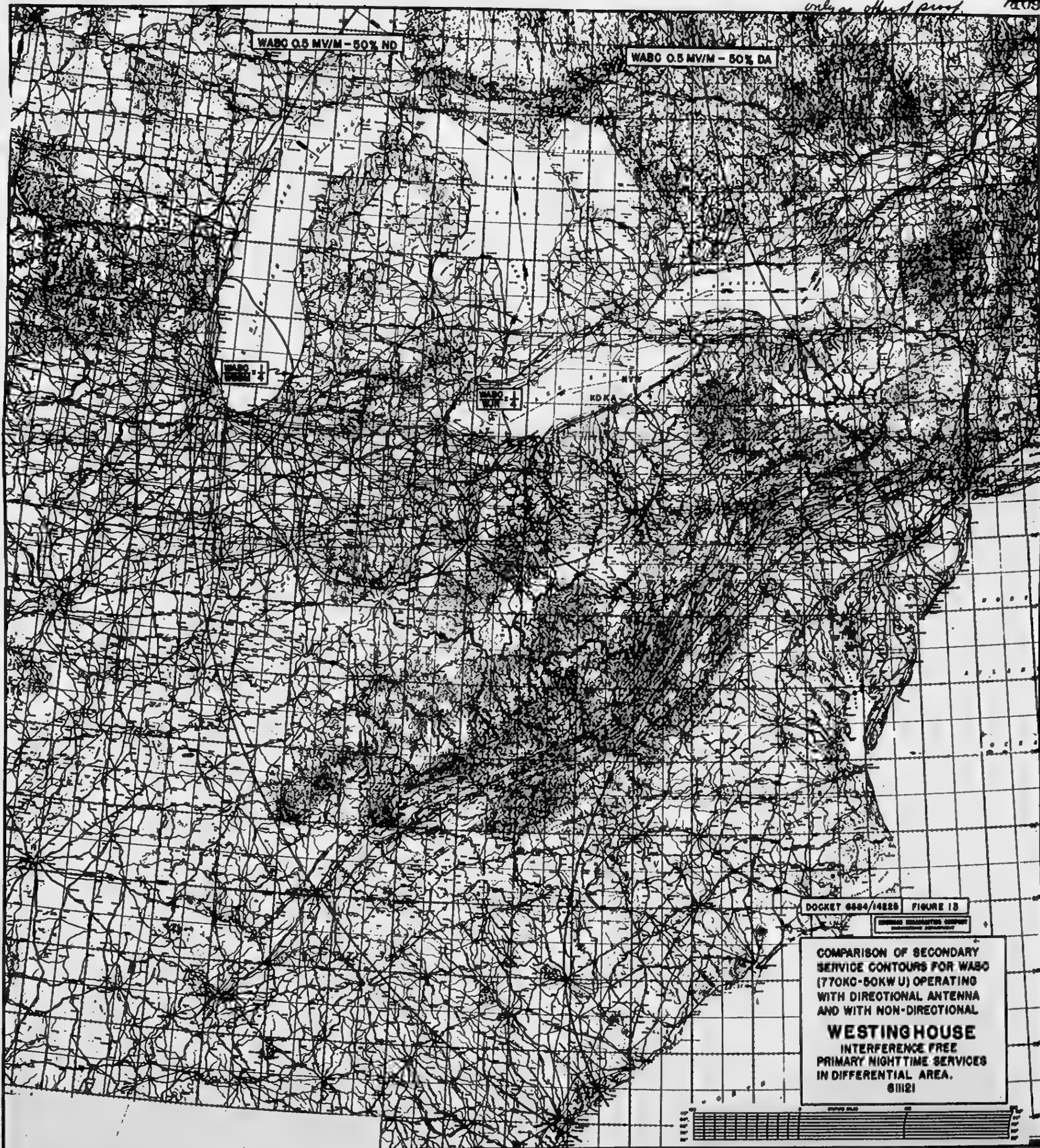




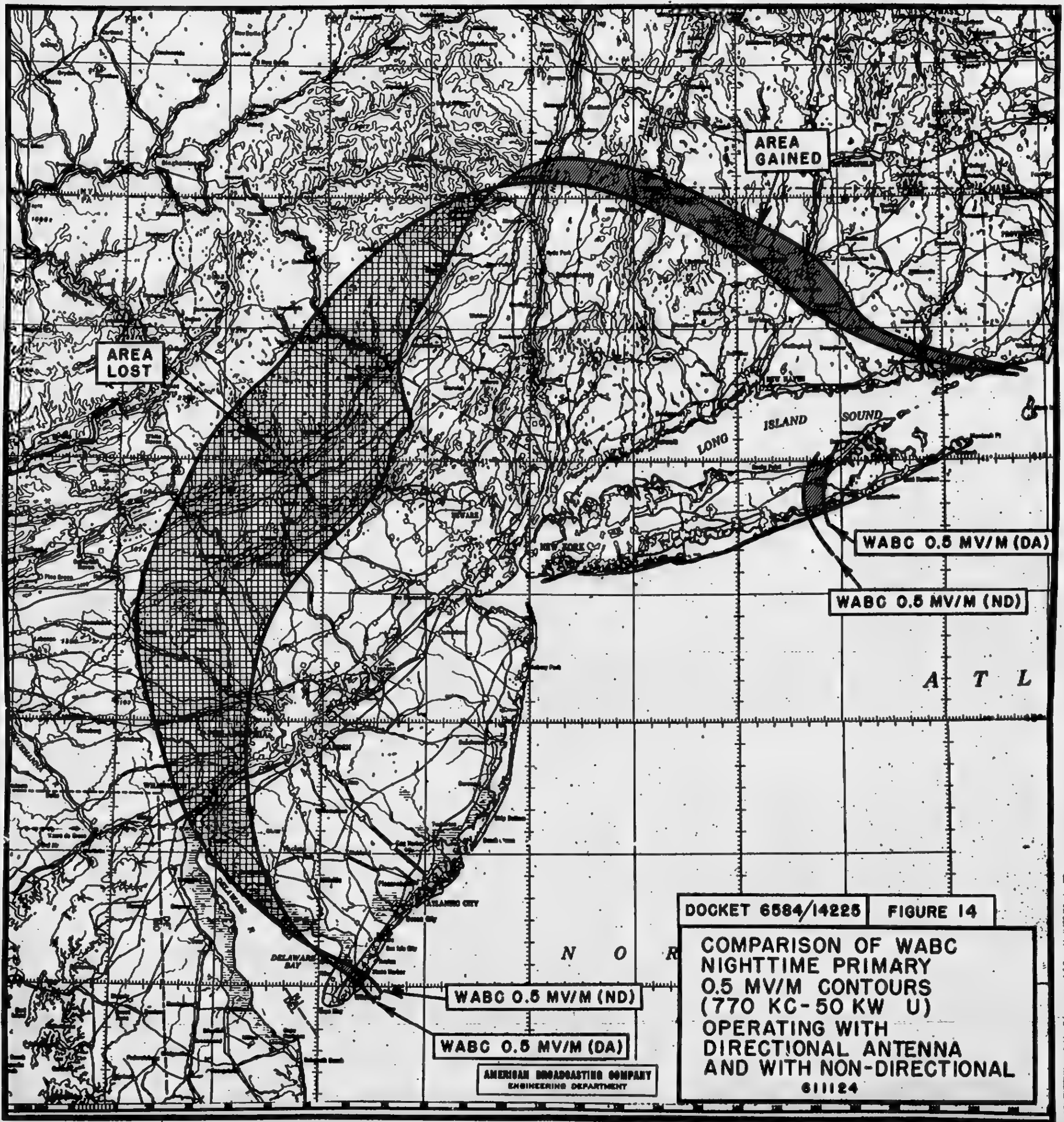


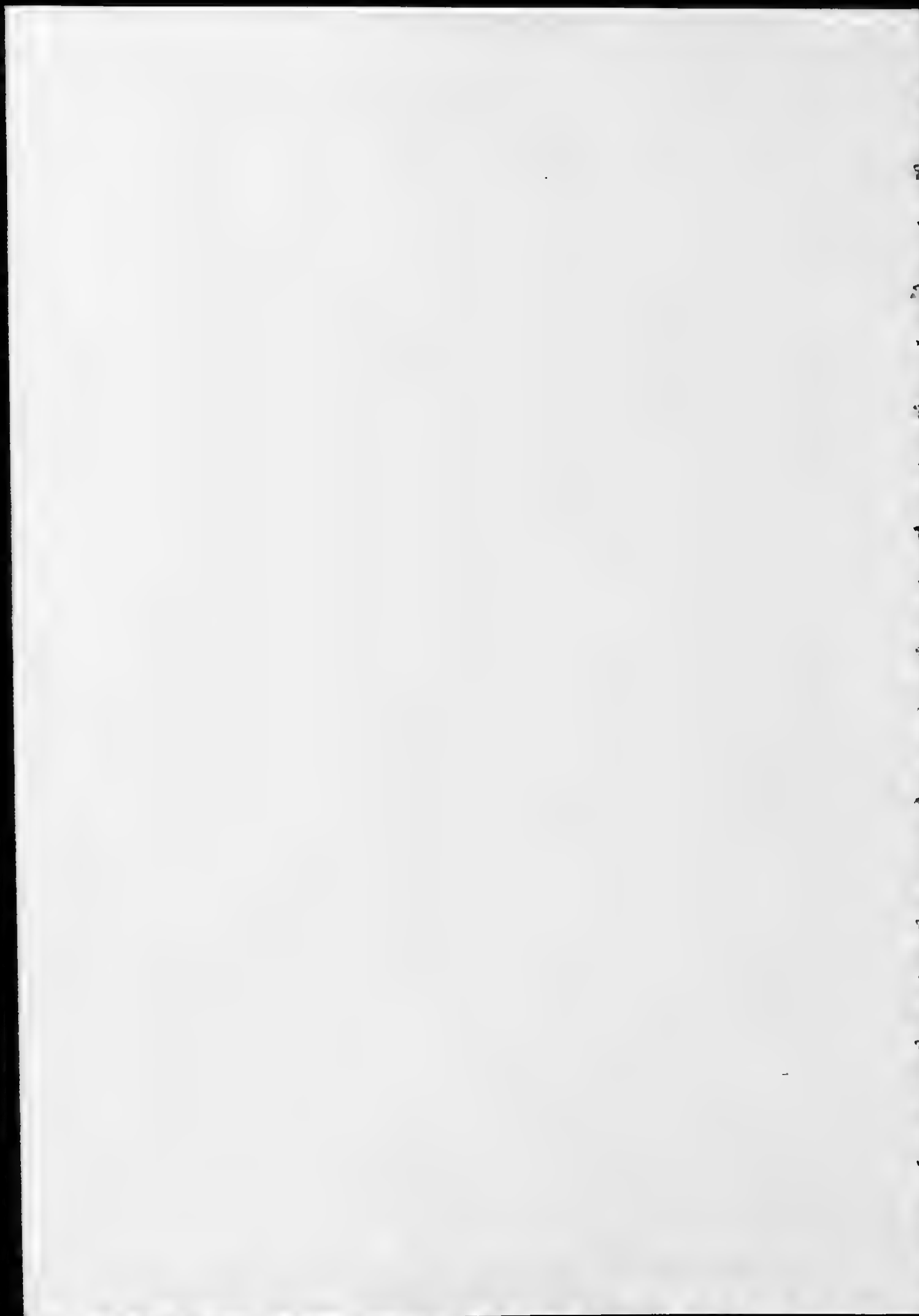


*Eliminated as evidence and appears only as other proof.*









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POPULATION AND AREA SUMMARYFOR FIGURE 14

## WABC Non-Directional

<u>Nighttime</u>	<u>Population</u>	<u>Area (sq. mi.)</u>
Primary Ground Wave (0.5 mvm)	17,707,715	19,270
Total Loss DA	976,699	4,807
Total Gain DA	<u>274,473</u>	<u>947</u>
Net Loss with DA	702,326	3,860
 Primary Groundwave (0.5 mv/m DA)	 17,005,389	 15,410











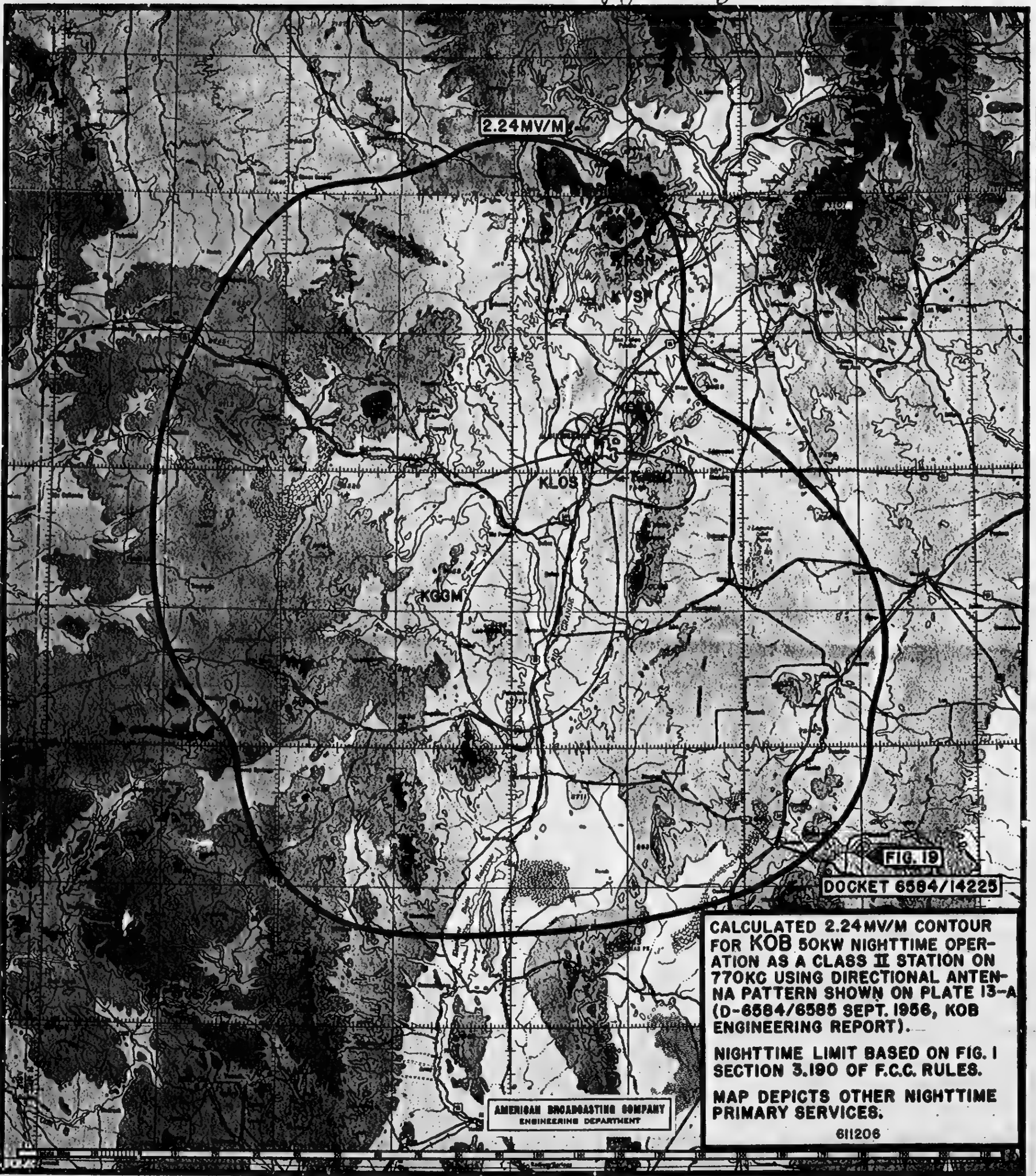






copy of proof map

1099-1100



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[Offer of proof]

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POPULATION AND AREA SUMMARYFOR FIGURE 19

	<u>Population</u>	<u>Area (sq. mi.)</u>
KOB 2.24 mv/m Contour operating as Class II	355,633	26,890
Primary Nighttime Service from other stations	<u>300,797</u>	<u>4,000</u>
Without Other Primary Nighttime Service	54,836	22,890

**1103-1104**





[Offer of proof]

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**POPULATION AND AREA SUMMARY**  
**FOR FIGURE 20**

	Population	Area (sq. mi.)
KOB Primary Nighttime (0.5 mv/m) operating as Class I-B	525,694	72,330
Primary Nighttime Service from Other Stations	<u>403,424</u>	<u>5,368</u>
Without Other Primary Nighttime Service	122,270	66,962
Comparison of areas without other primary nighttime service:		
KOB Class I-B	122,270	66,962
KOB Class II	<u>54,836</u>	<u>22,890</u>
Difference	67,434	44,072
Comparison of total primary nighttime coverage for Class I-B and Class II operation:		
KOB Class I-B (0.5 mv/m)	525,694	72,330
KOB Class II (2.24 mv/m)	<u>355,633</u>	<u>26,890</u>
Difference	170,061	45,440

TABULATION OF STATIONSWABC AREAABC

<u>F. 3</u>	<u>F. 4</u>	<u>F. 9</u>	<u>F. 15</u>	<u>Frequency (kc)</u>	<u>Call</u>	<u>Location</u>	<u>Nighttime Power</u>	<u>Class</u>
-	-	-	X	560	WFIL	Philadelphia, Pa.	5 kw, DA	III-A
X	-	X	-	580	WGAC	Augusta, Ga.	1 kw, DA	III-B
X	X	X	X	770	WABC	New York, N. Y.	50 kw, U	I-A
-	-	-	X	850	WEEU	Reading, Pa.	1kw, DA	II
X	-	X	-	850	WKBZ	Muskegon, Mich.	1 kw, DA	II
X	X	X	-	890	WLS	Chicago, Ill.	50 kw, U	I-A
-	-	-	X	910	WHAY	New Britain, Conn.	5 kw, DA	III-A
X	-	X	-	920	WMNI	Columbus, Ohio	0.5 kw, DA	III
X	-	X	-	930	WKCT	Bowling Green, Ky.	0.5 kw, DA	III
X	-	X	-	980	WILK	Wilkes-Barre, Pa.	1 kw, DA	III
X	-	X	-	1150	WISN	Milwaukee, Wis.	5 kw, DA	III-A
X	-	X	-	1150	WIMA	Lima, Ohio	1 kw, DA	III-B
X	-	X	-	1240	WBIR	Knoxville, Tenn.	250 w	IV
X	-	X	-	1240	WJTN	Jamestown, N. Y.	250 w	IV
X	-	X	-	1250	WGL	Fort Wayne, Ind.	1 kw, DA	II-B
X	-	X	-	1260	WFBM	Indianapolis, Ind.	5 kw, DA	III-A
X	-	X	-	1260	WNXT	Portsmouth, Ohio	1 kw, DA	III
X	-	X	-	1280	WKST	New Castle, Pa.	1 kw, DA	III-A
X	-	X	-	1290	WHKY	Hickory, N. C.	1 kw, DA	III-B
X	-	X	-	1300	WBLG	Lexington, Ky.	1 kw, DA	III-B
X	-	X	-	1330	WICU	Erie, Pa.	5 kw, DA	III-A



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ABC

<u>F. 3</u>	<u>F. 4</u>	<u>F. 9</u>	<u>F. 15</u>	<u>Frequency (kc)</u>	<u>Call</u>	<u>Location</u>	<u>Nighttime Power</u>	<u>Class</u>
X	-	X	-	1330	WHBL	Sheboygan, Wis.	250 w	III-B
X	-	X	-	1330	WTRX	Flint, Mich.	1 kw, DA	III-A
X	-	X	-	1340	WLAV	Grand Rapids, Mich.	250 w	IV
X	-	X	-	1340	WIZE	Springfield, Ohio	250 w	IV
X	-	X	-	1340	WKEY	Covington, Va.	250 w	IV
X	-	X	-	1370	WTTS	Bloomington, Ind.	0.5 kw, DA	III-B
X	-	X	-	1380	WTTH	Port Huron, Mich.	1 kw, DA	III-B
X	-	X	-	1400	WELL	Battle Creek, Mich.	250 w	IV
X	-	X	-	1400	WBAT	Marion, Ind.	250 w	IV
X	-	X	-	1400	WMAN	Mansfield, Ohio	250 w	IV
X	-	X	-	1400	WKWK	Wheeling, W. Va.	250 w	IV
X	-	X	-	1400	WHGB	Harrisburg, Pa.	250 w	IV
X	-	X	-	1410	KQV	Pittsburgh, Pa.	5 kw, DA	III-A
X	-	X	-	1410	WDOE	Dunkirk, N. Y.	0.5 kw, DA	III-B
X	-	X	-	1420	WVJS	Owensboro, Ky.	1 kw, DA	III-B
X	-	X	-	1440	WBCM	Bay City, Mich.	0.5 kw	III-B
-	-	-	X	1450	WILM	Wilmington, Del.	250 w	IV
X	-	X	-	1450	WKLA	Ludington, Mich.	250 w	IV
X	-	X	-	1450	WGNC	Gastonia, N. C.	250 w	IV
X	-	X	-	1450	WHDL	Olean, N. Y.	250 w	IV
X	-	X	-	1480	WHBC	Canton, Ohio	5kw, DA	III-A
X	-	X	-	1490	WNDU	South Bend, Ind.	250 w	IV
X	-	X	-	1490	WKVB	Richmond, Ind.	250 w	IV
X	-	X	-	1490	WJMO	Cleveland Hts., Ohio	250 w	IV
X	-	X	-	1490	WMRN	Marion, Ohio	250 w	IV
X	-	X	-	1490	WOHI	East Liverpool, Ohio	250 w	IV
-	X	-	-	1540	KXHL	Waterloo, Iowa	50 kw, DA	I-B
X	-	X	-	1590	WAKR	Akron, Ohio	5 kw, DA	III-A

TABULATION OF STATIONSWABC AREACBS

<u>F. 3</u>	<u>F. 5</u>	<u>F. 10</u>	<u>F. 16</u>	<u>Frequency (kc)</u>	<u>Call</u>	<u>Location</u>	<u>Nighttime Power</u>	<u>Class</u>
X	-	X	-	550	WGGA	Gainesville, Ga.	0.5 kw, DA	III
X	-	X	-	550	WKRC	Cincinnati, Ohio	1 kw, DA	III-B
X	-	X	-	560	WJLS	Beckley, W. Va.	0.5 kw, DA	III-B
X	-	X	-	570	WWNC	Asheville, N. C.	5 kw, DA	III-A
X	-	X	-	570	WKBN	Youngstown, Ohio	5 kw, DA	III-A
X	-	X	-	580	WCHS	Charleston, W. Va.	5 kw, DA	III-A
X	-	X	-	580	WHP	Harrisburg, Pa.	5 kw, DA	III-A
X	-	X	-	590	WVLK	Lexington, Ky.	1 kw, DA	III-B
X	-	X	-	590	WMBS	Uniontown, Pa.	5 kw, DA	III
X	-	X	-	590	WKZO	Kalamazoo, Mich.	5 kw, DA	III-A
X	X	X	-	780	WBBM	Chicago, Ill.	50 kw, U	III-A
X	-	X	-	790	WSGW	Saginaw, Mich.	1 kw, DA	III-B
X	X	-	-	830	WCCO	Minneapolis, Minn.	50 kw, U	I-A
X	X	-	-	870	WWL	New Orleans, La.	50 kw, DA	I-A
X	X	X	X	880	WCBS	New York, N. Y.	50 kw, U	I-A
X	-	X	-	910	WJCW	Johnson City, Tenn.	1 kw, DA	III-A
X	-	X	-	910	WGBI	Scranton, Pa.	0.5 kw	III-B
X	-	X	-	920	WMMN	Fairmont, W. Va.	5 kw, DA	III-A
X	-	X	-	930	WBEN	Buffalo, N. Y.	5 kw, DA	III-A
X	-	X	-	950	WSPA	Spartanburg, S. C.	5 kw, DA	III-A
X	-	X	-	960	WDBJ	Roanoke, Va.	5 kw, DA	III-A
X	-	X	-	960	WSBT	South Bend, Ind.	5 kw, DA	III-A

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CBS

<u>F. 3</u>	<u>F. 5</u>	<u>F. 10</u>	<u>F. 16</u>	<u>Frequency (kc)</u>	<u>Call</u>	<u>Location</u>	<u>Nighttime Power</u>	<u>Class</u>
X	-	X	-	990	WNOX	Knoxville, Tenn.	10 kw, DA	II
X	X	X	-	1110	WBT	Charlotte, N. C.	50 kw, DA	I-B
X	X	-	-	1120	KMOX	St. Louis, Mo.	50 kw, U	I-A
X	X	X	-	1170	WWVA	Wheeling, W. Va.	50 kw, DA	I-B
X	X	X	X	1210	WCAU	Philadelphia, Pa.	50 kw, U	I-A
X	-	X	-	1220	WGAR	Cleveland, Ohio	50 kw, DA	II
X	-	X	-	1230	WJEF	Grand Rapids, Mich.	250 w	IV
X	-	X	-	1230	WAIM	Anderson, S. C.	250 w	IV
X	-	X	-	1230	WCUM	Cumberland, Md.	250 w	IV
X	-	X	-	1240	WHBU	Anderson, Ind.	250 w	IV
-	-	-	X	1240	WHUM	Reading, Pa.	250 w	IV
X	-	X	-	1240	WKOK	Sunbury, Pa.	250 w	IV
X	-	X	-	1240	WJIM	Lansing, Mich.	250 w	IV
X	-	X	-	1290	WTOC	Savannah, Ga.	5 kw, DA	III-A
X	-	X	-	1290	WHIO	Dayton, Ohio	5 kw, DA	III-A
X	-	X	-	1290	WNBF	Binghamton, N. Y.	5 kw, DA	III-A
X	-	X	-	1310	WDOD	Chattanooga, Tenn.	5 kw, DA	III-A
X	-	X	-	1310	WISH	Indianapolis, Ind.	1 kw, DA	III-B
X	-	X	-	1340	WLEW	Bad Axe, Mich.	250 w	IV
X	-	X	-	1340	WLBC	Muncie, Ind.	250 w	IV
X	-	X	-	1340	WGAU	Athens, Ga.	250 w	IV
X	-	X	-	1340	WWPA	Williamsport, Pa.	250 w	IV
X	-	X	-	1350	WIOU	Kokomo, Ind.	1 kw, DA	III-B
X	-	X	-	1350	WADC	Akron, Ohio	5 kw, DA	III-A
X	-	X	-	1400	WPAY	Portsmouth, Ohio	250 w	IV
X	-	X	-	1400	WHUB	Cookeville, Tenn.	250 w	IV

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CBS

<u>F. 3</u>	<u>F. 5</u>	<u>F. 10</u>	<u>F. 16</u>	<u>Frequency (kc)</u>	<u>Call</u>	<u>Location</u>	<u>Nighttime Power</u>	<u>Class</u>
X	-	X	-	1410	WELM	Elmira, N. Y.	0.5 kw, DA	III
X	-	X	-	1420	WCED	Du Bois, Pa.	0.5 kw, DA	III
X	-	X	-	1430	WVAM	Altoona, Pa.	1 kw, DA	III-B
X	-	X	-	1450	WANE	Fort Wayne, Ind.	250 w	IV
X	-	X	-	1450	WDAD	Indiana, Pa.	250 w	IV
X	-	X	-	1460	WBNS	Columbus, Ohio	1 kw, DA	III-B
X	-	X	-	1460	WHEC	Rochester, N. Y.	5 kw, DA	III-A
X	-	X	-	1480	WRDW	Augusta, Ga.	5 kw, DA	III-A
X	-	X	-	1480	WTHI	Terre Haute, Ind.	1 kw, DA	III-B
X	-	X	-	1490	WDAN	Danville, Ill.	250 w	IV
X	-	X	-	1490	WOMI	Owensboro, Ky.	250 w	IV
X	-	X	-	1490	WMRB	Greenville, S. C.	250 w	IV
X	-	X	-	1490	WARK	Hagerstown, Md.	250 w	IV
X	-	X	-	1490	WARD	Johnstown, Pa.	250 w	IV
X	X	-	-	1500	WTOP	Washington, D. C.	50 kw, DA	I-B
X	X	X	-	1510	WLAC	Nashville, Tenn.	50 kw, DA	I-B
-	-	-	X	1590	WBRY	Waterbury, Conn.	5 kw, DA	II

TABULATION OF STATIONSWABC AREAMBS

<u>F. 3</u>	<u>F. 6</u>	<u>F. 11</u>	<u>F. 17</u>	<u>Frequency (kc)</u>	<u>Call</u>	<u>Location</u>	<u>Nighttime Power</u>	<u>Class</u>
X	-	X	-	550	WHLM	Bloomsburg, Pa.	1 kw, DA	III
X	-	X	-	610	WTVN	Columbus, Ohio	5 kw, DA	III-A
X	X	X	X	710	WOR	New York, N. Y.	50 kw, DA	I-B
-	-	-	X	950	WPEN	Philadelphia, Pa.	5 kw, DA	III-A
X	-	X	-	980	WFHG	Bristol, Va.	1 kw, DA	III
X	-	X	-	1150	WAPO	Chattanooga, Tenn.	1 kw, DA	III-B
X	-	X	-	1150	WCRK	Morristown, Tenn.	0.5 kw, DA	III
X	-	X	-	1230	WSAL	Logansport, Ind.	250 w	IV
X	-	X	-	1230	WBOW	Terre Haute, Ind.	250 w	IV
X	-	X	-	1230	WLOG	Logan, W. Va.	250 w	IV
X	-	X	-	1230	WTAP	Parkersburg, W. Va.	250 w	IV
X	-	X	-	1230	WCRO	Johnstown, Pa.	250 w	IV
X	-	X	-	1240	WOMT	Manitowoc, Wis.	250 w	IV
X	-	X	-	1240	WSFC	Somerset, Ky.	250 w	IV
X	-	X	-	1240	WPKE	Pikesville, Ky.	250 w	IV
X	-	X	-	1240	WTWA	Thomson, Ga.	250 w	IV
X	-	X	-	1240	WKOY	Bluefield, W. Va.	250 w	IV
X	-	X	-	1240	WTIP	Charleston, W. Va.	250 w	IV
X	-	X	-	1240	WBBW	Youngstown, Ohio	250 w	IV
X	-	X	-	1240	WJEJ	Hagerstown, Md.	250 w	IV
X	-	X	-	1240	WBAX	Wilkes-Barre, Pa.	250 w	IV
X	-	X	-	1260	WDOK	Cleveland, Ohio	5 kw, DA	III-A



MBS

<u>F. 3</u>	<u>F. 6</u>	<u>F. 11</u>	<u>F. 17</u>	<u>Frequency (kc)</u>	<u>Call</u>	<u>Location</u>	<u>Nighttime Power</u>	<u>Class</u>
X	-	X	-	1270	WCGC	Belmont, N. C.	0.5 kw, DA	III
X	-	X	-	1280	WANS	Anderson, S. C.	1 kw, DA	III
X	-	X	-	1290	WATO	Oak Ridge, Tenn.	0.5 kw, DA	III
X	-	X	-	1300	WSYD	Mt. Airy, N. C.	1 kw, DA	III
X	-	X	-	1320	WMSC	Columbia, S. C.	1 kw, DA	III-A
X	-	X	-	1340	WSTV	Steubenville, Ohio	250 w	IV
X	-	X	-	1340	WBAC	Cleveland, Tenn.	250 w	IV
X	-	X	-	1340	WBBQ	Augusta, Ga.	250 w	IV
X	-	X	-	1340	WRHI	Rock Hill, S. C.	250 w	IV
X	-	X	-	1340	WJRI	Lenoir, N. C.	250 w	IV
X	-	X	-	1340	WHAR	Clarksburg, W. Va.	250 w	IV
X	-	X	-	1340	WMON	Montgomery, W. Va.	250 w	IV
X	-	X	-	1340	WJOC	Jamestown, N. Y.	250 w	IV
X	-	X	-	1360	WPPA	Pottsville, Pa.	0.5 kw, DA	III-B
X	-	X	-	1400	WBTH	Williamson, W. Va.	250 w	IV
X	-	X	-	1400	WKBI	St. Mary's, Pa.	250 w	IV
X	-	X	-	1400	WJET	Erie, Pa.	250 w	IV
X	-	X	-	1410	WLBJ	Bowling Green, Ky.	1 kw, DA	III
X	-	X	-	1450	WHTC	Holland, Mich.	250 w	IV
X	-	X	-	1450	WASK	Lafayette, Ind.	250 w	IV
X	-	X	-	1450	WAOV	Vincennes, Ind.	250 w	IV
X	-	X	-	1450	WJER	Dover, Ohio	250 w	IV
X	-	X	-	1450	WLAR	Athens, Tenn.	250 w	IV
X	-	X	-	1450	WJPA	Washington, Pa.	250 w	IV
X	-	X	-	1450	WMAJ	State College, Pa.	250 w	IV

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MBS

<u>F. 3</u>	<u>F. 6</u>	<u>F. 11</u>	<u>F. 17</u>	<u>Frequency (kc)</u>	<u>Call</u>	<u>Location</u>	<u>Nighttime Power</u>	<u>Class</u>
X	-	X	-	1450	WCLI	Corning, N. Y.	250 w	IV
X	-	X	-	1450	WBYG	Savannah, Ga.	250 w	IV
X	-	X	-	1490	WBEX	Chillicothe, Ohio	250 w	IV
X	-	X	-	1490	WSIP	Paintsville, Ky.	250 w	IV
X	-	X	-	1490	WMRB	Greenville, S. C.	250 w	IV
X	-	X	-	1490	WTCS	Fairmont, W. Va.	250 w	IV
X	-	X	-	1490	WBTA	Batavia, N. Y.	250 w	IV

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TABULATION OF STATIONSWABC AREAWESTINGHOUSE

<u>F. 3</u>	<u>F. 8</u>	<u>F. 13</u>	<u>Frequency (kc)</u>	<u>Call</u>	<u>Location</u>	<u>Nighttime Power</u>	<u>Class</u>
X	X	X	1020	KDKA	Pittsburgh, Pa.	50 kw, U	I-A
-	X	-	1030	WBZ	Boston, Mass.	50 kw, DA	I-B
X	X	X	1100	KYW	Cleveland, Ohio	50 kw, DA	I-A
X	X	X	1190	WOWO	Fort Wayne, Ind.	50 kw, DA	I-B

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TABULATION OF STATIONSWABC AREANBC

<u>F. 3</u>	<u>F. 7</u>	<u>F. 12</u>	<u>F. 18</u>	<u>Frequency (kc)</u>	<u>Call</u>	<u>Location</u>	<u>Nighttime Power</u>	<u>Class</u>
X	-	X	-	550	WGR	Buffalo, N. Y.	5 kw, DA	III-A
X	-	X	-	560	WIS	Columbia, S. C.	5 kw, DA	III-A
X	-	X	-	610	WSLS	Roanoke, Va.	1 kw, DA	III-B
X	-	X	-	620	WATE	Knoxville, Tenn.	5 kw, DA	III-A
X	-	X	-	620	WTMJ	Milwaukee, Wis.	5 kw, DA	III-A
X	-	X	-	630	WSAV	Savannah, Ga.	5 kw, DA	III-A
X	X	X	-	650	WSM	Nashville, Tenn.	50 kw, U	I-A
X	X	X	X	660	WNBC	New York, N. Y.	50 kw, U	I-A
X	X	X	-	670	WMAQ	Chicago, Ill.	50 kw, U	I-A
X	X	X	-	700	WLW	Cincinnati, Ohio	50 kw, U	I-A
X	X	X	-	750	WSB	Atlanta, Ga.	50 kw, U	I-A
-	X	-	X	810	WGY	Schenectady, N. Y.	50 kw, U	I-B
-	X	-	-	820	WBAP/ WFAA	Dallas — Fort Worth, Texas	50 kw, U	I-A
X	-	X	-	850	WJW	Cleveland, Ohio	5 kw, DA	II
X	-	X	-	910	WORD	Spartanburg, S. C.	1 kw, DA	III
X	-	X	-	910	WFDF	Flint, Mich.	1 kw, DA	III-B
X	-	X	-	930	WSAZ	Huntington, W. Va.	1 kw, DA	III-B
X	-	X	-	950	WKAZ	Charleston, W. Va.	1 kw, DA	III-B
X	-	X	-	950	WWJ	Detroit, Mich.	5 kw, DA	III-A
X	-	X	-	970	WAVE	Louisville, Ky.	5 kw, DA	II-A
-	X	-	-	1040	WHO	Des Moines, Iowa	50 kw, U	I-A
X	X	X	X	1060	WRCV	Philadelphia, Pa.	50 kw, DA	I-B
-	X	-	X	1080	WTIC	Hartford, Conn.	50 kw, DA	I-B
X	X	X	X	1090	WBAL	Baltimore, Md.	50 kw, DA	I-B

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NBC

<u>F. 3</u>	<u>F. 7</u>	<u>F. 12</u>	<u>F. 18</u>	<u>Frequency (kc)</u>	<u>Call</u>	<u>Location</u>	<u>Nighttime Power</u>	<u>Class</u>
-	X	-	-	1140	WRVA	Richmond, Va.	50 kw, DA	I-B
-	-	-	X	1150	WDEL	Wilmington, Del.	5 kw, DA	III-A
X	-	X	-	1320	WBIA	Augusta, Ga.	250 w	IV
X	-	X	-	1230	WKBO	Harrisburg, Pa.	250 w	IV
X	-	X	-	1230	WENY	Elmira, N. Y.	250 w	IV
X	-	X	-	1240	WHIZ	Zanesville, Ohio	250 w	IV
X	-	X	-	1280	WGBF	Evansville, Ind.	1 kw, DA	III-B
X	-	X	-	1280	WVET	Rochester, N. Y.	5 kw, DA	III-A
X	-	X	-	1300	WOOD	Grand Rapids, Mich.	5 kw, DA	III-A
X	-	X	-	1320	WJAS	Pittsburgh, Pa.	5 kw, DA	III-A
X	-	X	-	1320	WSCR	Scranton, Pa.	0.5 kw, DA	III
X	-	X	-	1330	WFBC	Greenville, S. C.	5 kw, DA	III-A
X	-	X	-	1340	WTRC	Elkhart, Ind.	250 w	IV
-	-	-	X	1340	WRAW	Reading, Pa.	250 w	IV
X	-	X	-	1340	WKRZ	Oil City, Pa.	250 w	IV
X	-	X	-	1340	WBRE	Wilkes-Barre, Pa.	250 w	IV
X	-	X	-	1370	WDEF	Chattanooga, Tenn.	5 kw, DA	III-A
X	-	X	-	1380	WLOS	Asheville, N. C.	1 kw, DA	III-B
X	-	X	-	1380	WKJG	Fort Wayne, Ind.	5 kw, DA	III-A
X	-	X	-	1390	WFMJ	Youngstown, Ohio	5 kw, DA	III-A
X	-	X	-	1400	WTCM	Traverse City, Mich.	250 w	IV
X	-	X	-	1400	WSAM	Saginaw, Mich.	250 w	IV
X	-	X	-	1400	WBOY	Clarksburg, W. Va.	250 w	IV
X	-	X	-	1400	WKPT	Kingsport, Tenn.	250 w	IV
-	-	-	X	1400	WEST	Easton, Pa.	250 w	IV
X	-	X	-	1400	WJAC	Johnstown, Pa.	250 w	IV



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NBC

<u>F. 3</u>	<u>F. 7</u>	<u>F. 12</u>	<u>F. 18</u>	<u>Frequency (kc)</u>	<u>Call</u>	<u>Location</u>	<u>Nighttime Power</u>	<u>Class</u>
X	-	X	-	1400	WRAK	Williamsport, Pa.	250 w	IV
X	-	X	-	1430	WIRE	Indianapolis, Ind.	5 kw, DA	III-A
X	-	X	-	1430	WEIR	Weirton, W. Va.	1 kw, DA	III
X	-	X	-	1440	WHIS	Bluefield, W. Va.	0.5 kw	III-A
X	-	X	-	1440	WAJR	Morgantown, W. Va.	0.5 kw, DA	III
X	-	X	-	1450	WCRS	Greenwood, S. C.	250 w	IV
X	-	X	-	1450	WTBO	Cumberland, Md.	250 w	IV
X	-	X	X	1470	WSAN	Allentown, Pa.	5 kw, DA	III-A
X	-	X	-	1490	WMOA	Marietta, Ohio	250 w	IV
X	-	X	-	1490	WOPI	Bristol, Tenn.	250 w	IV
X	-	X	-	1490	WAZL	Hazletown, Pa.	250 w	IV
X	-	X	-	1490	WMRF	Lewistown, Pa.	250 w	IV

TABULATION OF STATIONS  
WABC AREA  
INDEPENDENTS  
WITHOUT NETWORK AFFILIATIONS  
Figure 3

<u>Frequency</u>	<u>Call</u>	<u>Location</u>	<u>Nighttime Facility</u>	<u>Class</u>
590 kc	WARM	Scranton, Pennsylvania	5 kw, DA	III
600 kc	WTAC	Flint, Michigan	0.5 kw, DA	III-B
620 kc	WWNR	Beckley, West Virginia	0.5kw, DA	III
620 kc	WHJB	Greensburg, Pennsylvania	0.5 kw, DA	III-B
630 kc	WLAP	Lexington, Kentucky	1 kw, DA	III
680 kc	WCAW	Charleston, West Virginia	250 W, DA	II
720 kc	WGN	Chicago, Illinois	50 kw, U	I-A
760 kc	WJR	Detroit, Michigan	50 kw, U	I-A
790 kc	WAKY	Louisville, Kentucky	1 kw, DA	III-B
790 kc	WAEB	Allentown, Pennsylvania	1 kw, DA	III-B
840 kc	WHAS	Louisville, Kentucky	50 kw, U	I-A
910 kc	WPFB	Middletown, Ohio	100 W	III
930 kc	WEOL	Elyria, Ohio	1 kw, DA	III-B
930 kc	WBCK	Battle Creek, Michigan	1 kw, DA	II-B
950 kc	WBBF	Rochester, New York	1 kw, DA	III-B
960 kc	WRFC	Athens, Georgia	0.5 kw, DA	III
970 kc	WREO	Ashtabula, Ohio	1 kw, DA	II-B
970 kc	WEBR	Buffalo, New York	5 kw, DA	III-A
970 kc	WWSW	Pittsburgh, Pennsylvania	5 kw, DA	III-A
980 kc	WITY	Danville, Illinois	1 kw, DA	III
980 kc	WONE	Dayton, Ohio	5 kw, DA	III-A
1000 kc	WCFL	Chicago, Illinois	50 kw, DA	I-A

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Figure 3

<u>Frequency</u>	<u>Call</u>	<u>Location</u>	<u>Nighttime Facility</u>	<u>Class</u>
1070 kc	WFLI	Lookout Mountain, Tennessee	1 kw, DA	II
1070 kc	WIBC	Indianapolis, Indiana	10 kw, DA	II
1080 kc	WKLO	Louisville, Kentucky	1 kw, DA	II
1130 kc	WNEW	New York, New York	50 kw, DA	1-B
1150 kc	WCEN	Mt. Pleasant, Michigan	0.5 kw, DA	III
1180 kc	WHAM	Rochester, New York	50 kw, U	I-A
1230 kc	WSOO	Sault Ste. Marie, Michigan	250 W	IV
1230 kc	WSTR	Sturgis, Michigan	250 W	IV
1230 kc	WTCJ	Tell City, Indiana	250 W	IV
1230 kc	WHIR	Danville, Kentucky	250 W	IV
1230 kc	WMLF	Pineville, Kentucky	250 W	IV
1230 kc	WMMT	McMinnville, Tennessee	250 W	IV
1230 kc	WBLJ	Dalton, Georgia	250 W	IV
1230 kc	WSOK	Savannah, Georgia	250 W	IV
1230 kc	WNOK	Columbia, South Carolina	250 W	IV
1230 kc	WSKY	Asheville, North Carolina	250 W	IV
1230 kc	WNNC	Newton, North Carolina	250 W	IV
1230 kc	WBI	Abingdon, Virginia	250 W	IV
1230 kc	WCFV	Clifton Forge, Virginia	250 W	IV
1230 kc	WCOL	Columbus, Ohio	250 W	IV
1230 kc	WCPO	Cincinnati, Ohio	250 W	IV
1230 kc	WIRO	Ironton, Ohio	250 W	IV
1230 kc	WBVP	Beaver Falls, Pennsylvania	250 W	IV
1230 kc	WEEX	Easton, Pennsylvania	250 W	IV
1230 kc	WNIA	Cheektowaga, New York	250 W	IV

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Ex. No. 101 WABC (Cont'd.)

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Figure 3

<u>Frequency</u>	<u>Call</u>	<u>Location</u>	<u>Nighttime Facility</u>	<u>Class</u>
1240 kc	WINN	Louisville, Kentucky	250 W	IV
1240 kc	WFTM	Maysville, Kentucky	250 W	IV
1240 kc	WBEJ	Elizabethton, Tennessee	250 W	IV
1240 kc	WDUN	Gainesville, Georgia	250 W	IV
1240 kc	WWNS	Statesboro, Georgia	250 W	IV
1240 kc	WKDK	Newberry, South Carolina	250 W	IV
1240 kc	WPNF	Brevard, North Carolina	250 W	IV
1240 kc	WDNE	Elkins, West Virginia	250 W	IV
1240 kc	WRTA	Altoona, Pennsylvania	250 W	IV
1240 kc	WGVA	Geneva, New York	250 W	IV
1240 kc	WCBY	Cheboygan, Michigan	250 W	IV
1240 kc	WATT	Cadillac, Michigan	250 W	IV
1250 kc	WRYT	Pittsburgh, Pennsylvania	5 kw, DA	III-A
1260 kc	WALM	Albion, Michigan	0.5 kw, DA	III
1260 kc	WERC	Erie, Pennsylvania	5 kw, DA	III-B
1270 kc	WLBR	Lebanon, Pennsylvania	1 kw, DA	III
1280 kc	WONW	Defiance, Ohio	0.5 kw, DA	III
1290 kc	WVOW	Logan, West Virginia	1 kw, DA	III-B
1290 kc	WHGR	Houghton Lake, Michigan	5 kw, DA	III
1290 kc	WFBG	Altoona, Pennsylvania	1 kw, DA	III
1300 kc	WERE	Cleveland, Ohio	5 kw, DA	III-A
1310 kc	WISE	Asheville, North Carolina	1 kw, DA	III
1320 kc	WILS	Lansing, Michigan	1 kw, DA	III
1320 kc	WKAP	Allentown, Pennsylvania	1 kw, DA	III
1340 kc	WMBN	Petoskey, Michigan	250 W	IV

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Figure 3

<u>Frequency</u>	<u>Call</u>	<u>Location</u>	<u>Nighttime Facility</u>	<u>Class</u>
1340 kc	WMTE	Manistee, Michigan	250 W	IV
1340 kc	WCSR	Hillsdale, Michigan	250 W	IV
1340 kc	WBIW	Bedford, Indiana	250 W	IV
1340 kc	WEKY	Richmond, Kentucky	250 W	IV
1340 kc	WBGH	Bowling Green, Kentucky	250 W	IV
1340 kc	WCMI	Ashland, Kentucky	250 W	IV
1340 kc	WKGN	Knoxville, Tennessee	250 W	IV
1340 kc	WGRV	Greeneville, Tennessee	250 W	IV
1340 kc	WOVE	Welch, West Virginia	250 W	IV
1340 kc	WEPM	Martinsburg, West Virginia	250 W	IV
1340 kc	WCVI	Connellsville, Pennsylvania	250 W	IV
1340 kc	WUSJ	Lockport, New York	250 W	IV
1360 kc	WSAI	Cincinnati, Ohio	5 kw, DA	III-A
1360 kc	WKMI	Kalamazoo, Michigan	1 kw, DA	III-B
1370 kc	WOTR	Corry, Pennsylvania	0.5 kw, DA	III
1370 kc	WSAY	Rochester, New York	5 kw, DA	III-A
1400 kc	WIEL	Elizabethtown, Kentucky	250 W	IV
1400 kc	WFTG	London, Kentucky	250 W	IV
1400 kc	WCYN	Cynthiana, Kentucky	250 W	IV
1400 kc	WRON	Ronceverte, West Virginia	250 W	IV
1400 kc	WGAP	Marysville, Tennessee	250 W	IV
1400 kc	WLSB	Copper Hill, Tennessee	250 W	IV
1400 kc	WSGC	Elberton, Georgia	250 W	IV
1400 kc	WSGA	Savannah, Georgia	250 W	IV
1400 kc	WTHE	Spartanburg, South Carolina	250 W	IV



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Ex. No. 101 WABC (Cont'd.)

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Figure 3

<u>Frequency</u>	<u>Call</u>	<u>Location</u>	<u>Nighttime Facility</u>	<u>Class</u>
1400 kc	WHCC	Waynesville, North Carolina	250 W	IV
1400 kc	WSIC	Statesville, North Carolina	250 W	IV
1400 kc	WBNY	Buffalo, New York	250 W	IV
1410 kc	WING	Dayton, Ohio	5 kw, DA	III-A
1420 kc	WHK	Cleveland, Ohio	5 kw, DA	III-A
1440 kc	WQOK	Greenville, South Carolina	5 kw, DA	III-A
1440 kc	WHHH	Warren, Ohio	5 kw, DA	III-A
1450 kc	WATZ	Alpena, Michigan	250 W	IV
1450 kc	WMOH	Hamilton, Ohio	250 W	IV
1450 kc	WXVW	Jeffersonville, Indiana	250 W	IV
1450 kc	WTCO	Campbellsville, Kentucky	250 W	IV
1450 kc	WWXL	Manchester, Kentucky	250 W	IV
1450 kc	WLAF	LaFollette, Tennessee	250 W	IV
1450 kc	WOGA	Chattanooga, Tennessee	250 W	IV
1450 kc	WCON	Cornelia, Georgia	250 W	IV
1450 kc	WATA	Boone, North Carolina	250 W	IV
1450 kc	WHKP	Hendersonville, North Carolina	250 W	IV
1450 kc	WPAR	Parkersburg, West Virginia	250 W	IV
1450 kc	WPAM	Pottsville, Pennsylvania	250 W	IV
1450 kc	WMPT	South Williamsport, Pennsylvania	250 W	IV
1450 kc	WLEU	Erie, Pennsylvania	250 W	IV
1460 kc	WBCU	Union, South Carolina	1 kw, DA	III-B
1460 kc	WRAD	Radford, Virginia	0.5 kw, DA	III
1470 kc	WFAR	Farrell, Pennsylvania	0.5 kw, DA	III
1480 kc	WCIN	Cincinnati, Ohio	0.5 kw, DA	III

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Figure 3

<u>Frequency</u>	<u>Call</u>	<u>Location</u>	<u>Nighttime Facility</u>	<u>Class</u>
1480 kc	WRSW	Warsaw, Indiana	0.5 kw, DA	III
1480 kc	WISL	Shamokin, Pennsylvania	1 kw, DA	III-B
1490 kc	WCBQ	Whitehall, Michigan	250 W	IV
1490 kc	WMDN	Midland, Michigan	250 W	IV
1490 kc	WKAY	Glasgow, Kentucky	250 W	IV
1490 kc	WFKY	Frankfort, Kentucky	250 W	IV
1490 kc	WROL	Fountain City, Tennessee	250 W	IV
1490 kc	WDXB	Chattanooga, Tennessee	250 W	IV
1490 kc	WMRE	Monroe, Georgia	250 W	IV
1490 kc	WSNT	Sandersville, Georgia	250 W	IV
1490 kc	WGCD	Chester, South Carolina	250 W	IV
1490 kc	WLOH	Princeton, West Virginia	250 W	IV
1490 kc	WHMS	Charleston, West Virginia	250 W	IV
1490 kc	WMGW	Meadville, Pennsylvania	250 W	IV
1490 kc	WESB	Bradford, Pennsylvania	250 W	IV
1520 kc	WSLV	Shelbyville, Indiana	250 W, DA	II
1520 kc	WKBW	Buffalo, New York	50 kw, DA	I-B
1530 kc	WCKY	Cincinnati, Ohio	50 kw, DA	I-B
1550 kc	WCTW	New Castle, Indiana	250 W, DA	II
1590 kc	WTVB	Coldwater, Michigan	0.5 kw, DA	III
1600 kc	WTRU	Muskegon, Michigan	5 kw, DA	III-A

TABULATION OF STATIONSKOB AREA

<u>F. 19</u>	<u>F. 20</u>	<u>Frequency (kc)</u>	<u>Call</u>	<u>Location</u>	<u>Nighttime Power</u>	<u>Class</u>	<u>Net</u>
X	X	610	KGGM	Albuquerque, N. M.	5 kw, DA	III-A	CBS
X	-	920	KQEO	Albuquerque, N. M.	0.5 kw, DA	III	MBS
-	X	930	KIUP	Durango, Colo.	1.0 kw, DA	III	---
-	X	1230	KYVA	Gallup, N. M.	0.25 w	IV	---
X	X	1260	KVSF	Santa Fe, N. M.	1.0 kw, U	III-A	CBS
-	X	1330	KGAK	Gallup, N. M.	1.0 kw, DA	III	---
-	X	1340	KNDE	Aztec, N. M.	250 w	IV	---
-	X	1340	KYAP	Ruidoso, N. M.	250 w	IV	---
-	X	1340	KSIL	Silver City, N. M.	250 w	IV	MBS
X	-	1350	KABQ	Albuquerque, N. M.	0.5 kw, DA	III	---
-	X	1390	KENN	Farmington, N. M.	1.0 kw, DA	III	---
-	X	1400	KCHS	Truth or Consequences, N. M.	250 w	IV	---
-	X	1400	KTRC	Santa Fe, N. M.	250 w	IV	ABC
X		1450	KLOS	Albuquerque, N. M.	250 w	IV	---
X	X	1490	KRSN	Los Alamos, N. M.	250 w	IV	ABC

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Ex. No. 102 WABC (Con't.d)

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EXHIBIT 102 WABC  
SUPPLEMENTARY ENGINEERING REPORT

WABC, NEW YORK, N.Y.

(770KC, 50KW, U I-A)

DOCKET 6584

DOCKET 14225

American Broadcasting-Paramount Theatres, Inc.

December 1961

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AFFIDAVIT

CITY OF WASHINGTON )  
                              ) SS  
DISTRICT OF COLUMBIA)

Frank G. Kear, having been duly sworn, deposes and says:

1. That he is a qualified engineer engaged in consulting engineering in the City of Washington, District of Columbia; that he has been granted registration to practice as a Professional Engineer in the District of Columbia; that he is a member of the firm of Kear and Kennedy, and that his qualifications are a matter of record with the Federal Communications Commission.

2. That the firm of Kear and Kennedy has been retained by American Broadcasting-Paramount Theatres, Inc., licensee of Station WABC, New York, New York (770 kc, 50 kw-U, BR-167), for the preparation of certain supplementary engineering material in connection with the WABC/KOB hearings, Docket No. 6584 (KSTP, Inc. KOB, Albuquerque, New Mexico, BMP-1738) and Docket 14225 (WABC, BR-167).

3. That he has prepared or caused to be prepared under his immediate supervision the attached engineering statement and exhibits in accordance with the FCC Rules Governing Radio Broadcast Services.

4. That the foregoing statements and the afore-mentioned exhibits which are attached to and form part of this report are true and correct of his own knowledge except such statements as are on information and belief, and as to such statements, he believes them to be true.

/s/ Frank G. Kear

[JURAT - Dated December 28, 1961]

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#### ENGINEERING STATEMENT

This is a supplementary engineering report prepared on behalf of American Broadcasting-Paramount Theatres, Inc., licensee of Station WABC, New York, New York (770 kc, 50 kw-U, BR-167) relative to certain issues in the WABC/KOB hearings, Docket No. 6584 (KSTP, Inc. KOB, Albuquerque, New Mexico, BMP-1738) and Docket No. 14225 (WABC, BR-167).

Figure 21 illustrates the secondary service area of KOB operating as a Class I-B station on 770 kc, with a power of 50 kw utilizing a directional antenna. This coverage was based on the directional antenna pattern of Plate 9A, Figure 1, of the September 1956 KOB Engineering Report (D-6584/6585). The shaded portions indicate areas between the KOB primary nighttime and secondary contours which receive interference free primary nighttime service while the white or unshaded portions reflect areas not receiving primary service at night. This exhibit also depicts other secondary services to the various areas referred to above.

Figure 22 illustrates the 0.5 mv/m primary nighttime contour of KOB operating as a Class I-B station and the other secondary services to the KOB service area.

Figure 23 portrays the 2.24 mv/m contour of KOB operating as a Class II station protecting the nighttime secondary service of WABC operating as a Class I-A (ND) station. Other secondary services to the area are also illustrated on Figure 23. The 2.24 mv/m contour was



based on the directional antenna pattern illustrated on Plate 13-A of the September 1956 KOB engineering report (D-6584/6585). This report is a

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matter of record and is on file with the Commission.

Population and area summaries will be found appended to Figs. 21, 22 and 23 for purposes of reference.

It should be noted that the engineering data contained herein is being submitted as supplementary information to the WABC Engineering Report dated December 12, 1961 (D-6584/14225). The attached exhibits were prepared in accordance with methods as outlined in the December 12, 1961, WABC Engineering Report.

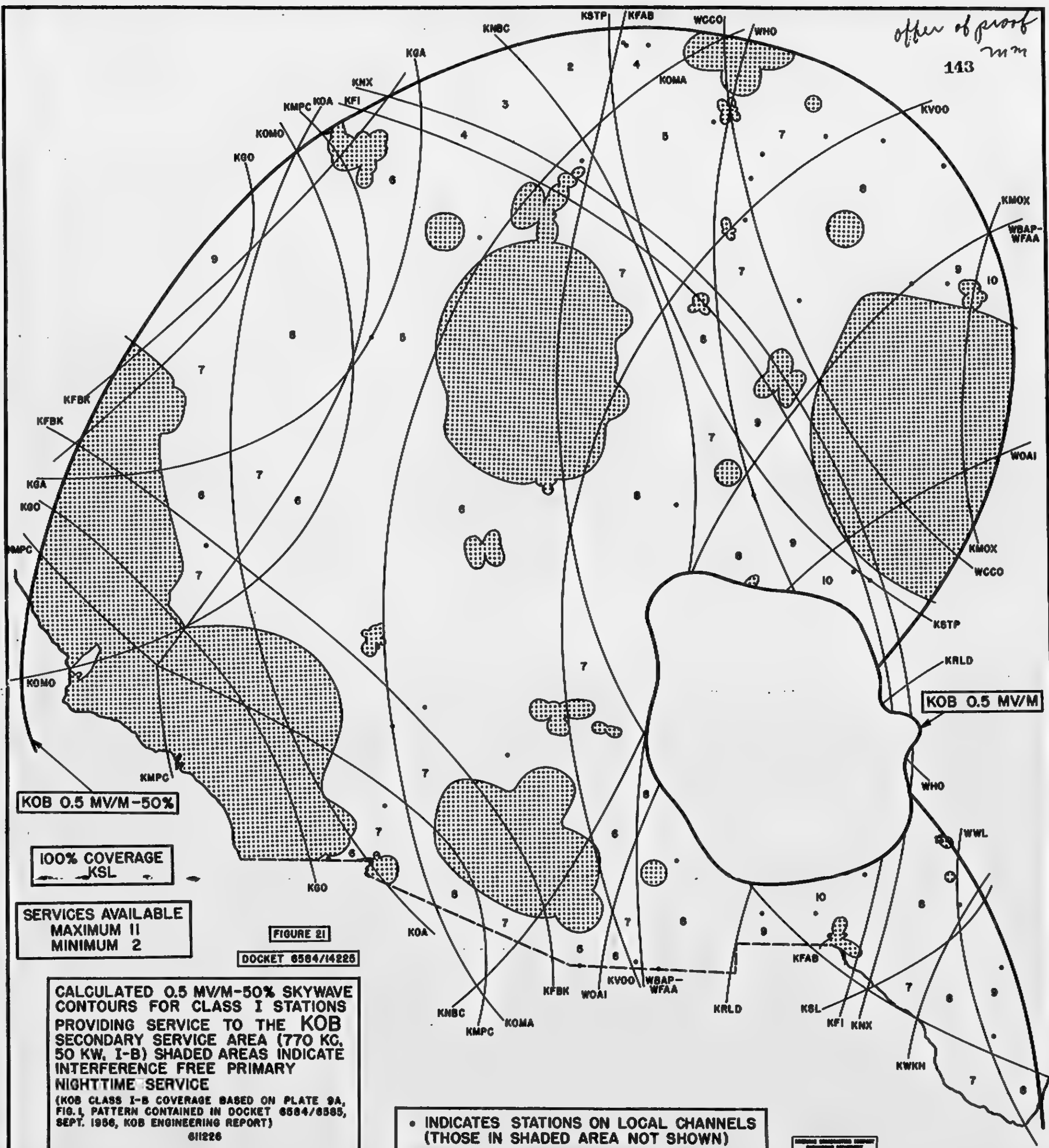
A tabulation of stations will be found at the end of this report. Network affiliations for the stations listed were determined by reference to the January 10, 1961 edition of "Standard Rates of Data".

All populations were determined by reference to the 1960 U.S. Census Reports. Areas were determined using a planimeter.

The engineering contained in this report has been prepared in accordance with the Commission's Rules Governing Radio Broadcast Services and Stipulation No. 1 (D-6584/6585).

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1129-1130





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SUMMARY OF POPULATION AND AREA DATA for FIG. 21KOB Directional Operation (I-B)

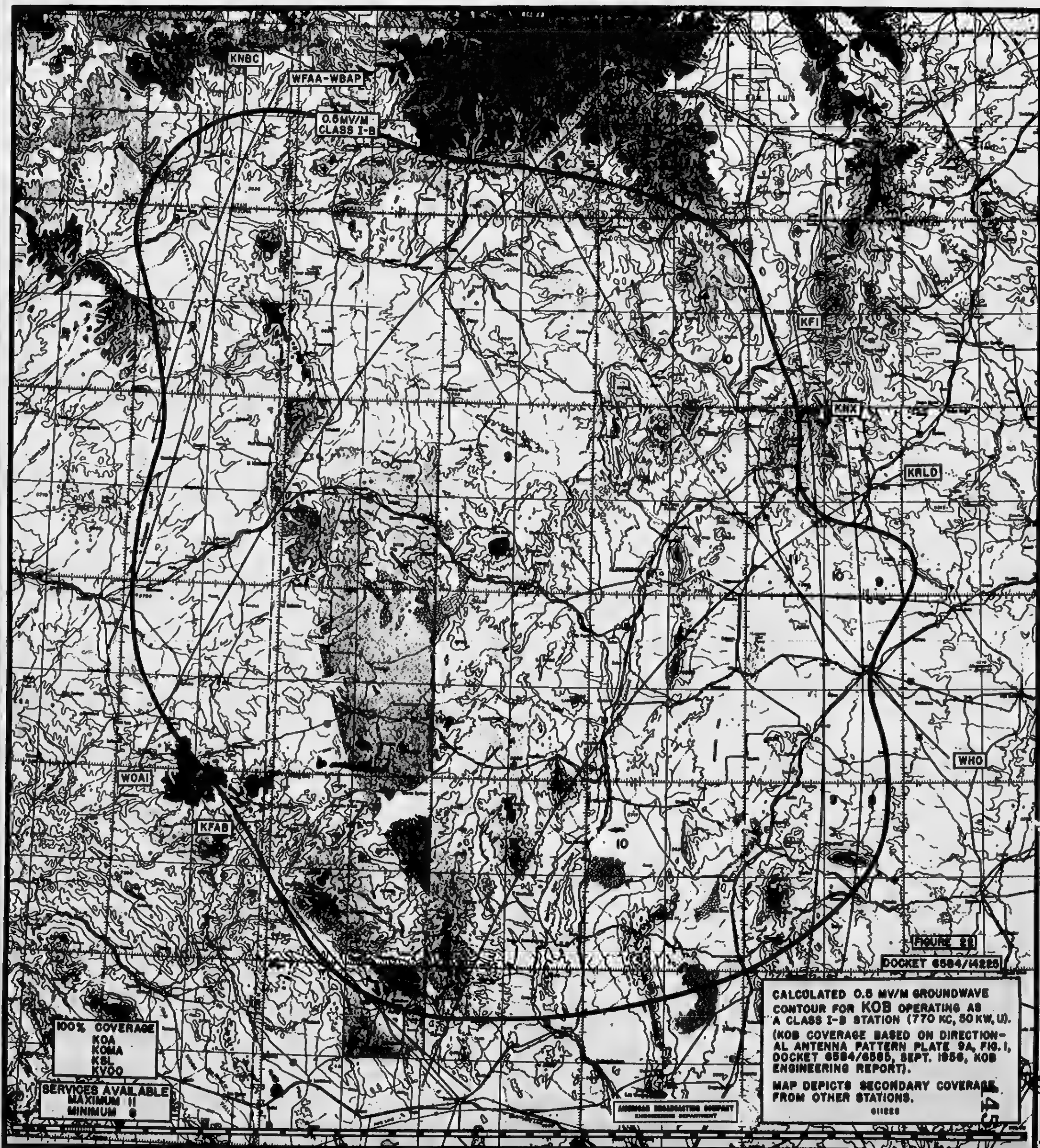
<u>Nighttime</u>	<u>Population</u>	<u>Area (sq. mi.)</u>
Primary Ground Wave (0.5 mv/m)	525,694	72,330
Secondary Service (0.5 mv/m 50%)	3,371,676	744,000
Total Primary and Secondary Service		816,330

Area between KOB 0.5 mv/m Ground Wave Contour  
and 0.5 mv/m 50% Skywave Contour not receiving  
nighttime primary service:

<u>Population</u>	<u>Area (sq. mi.)</u>
1,253,605	505,798

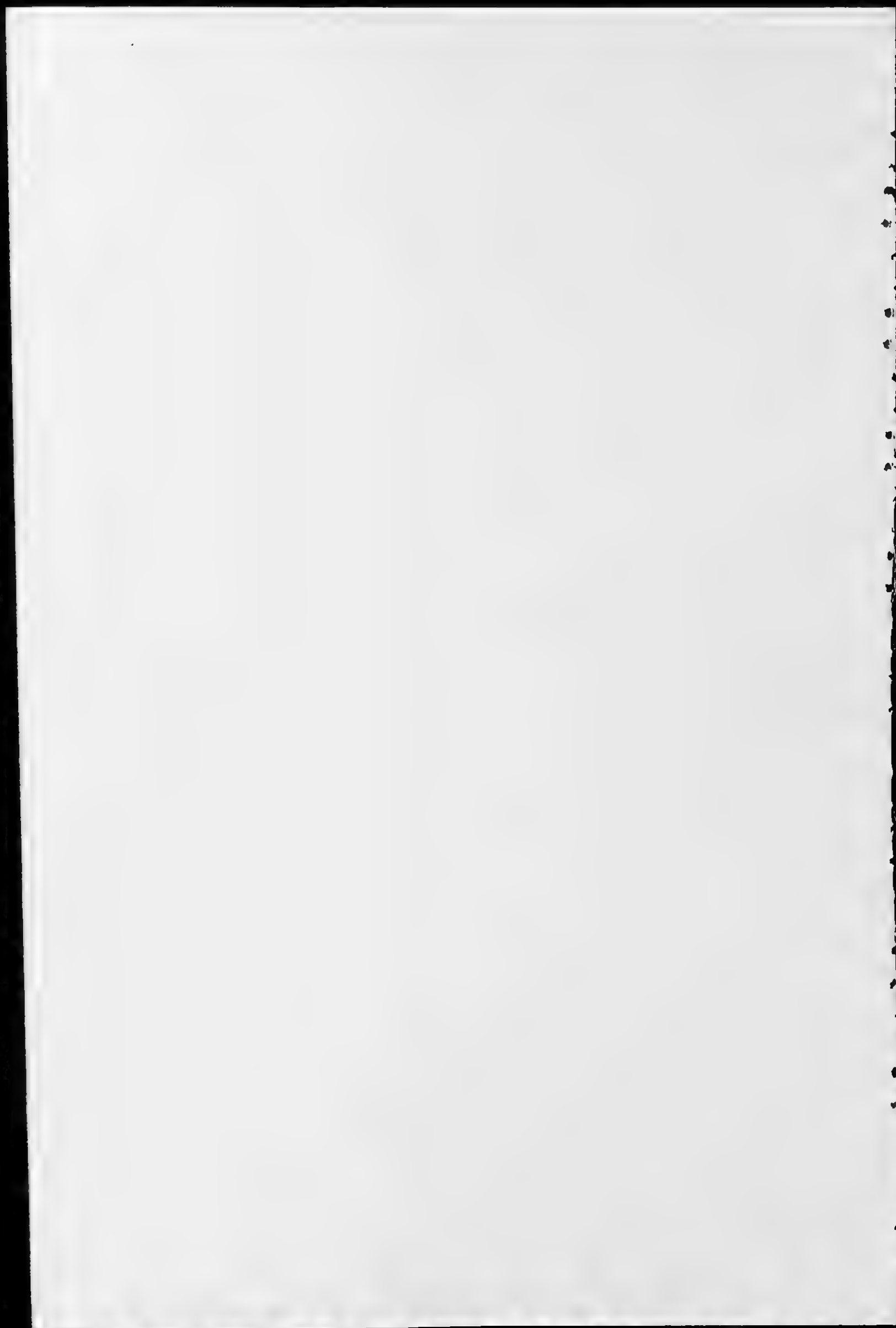


1133-  
1133-1134



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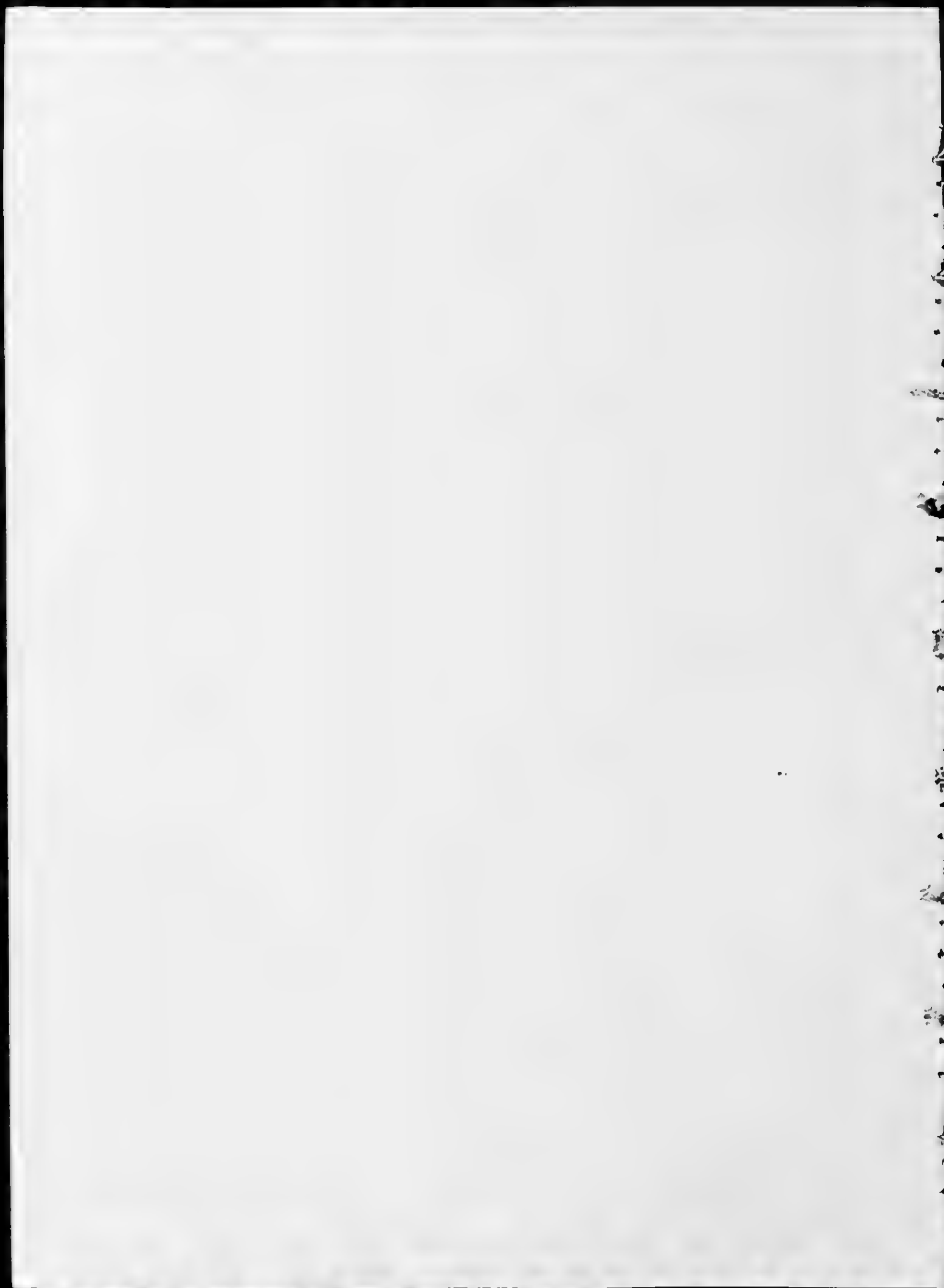


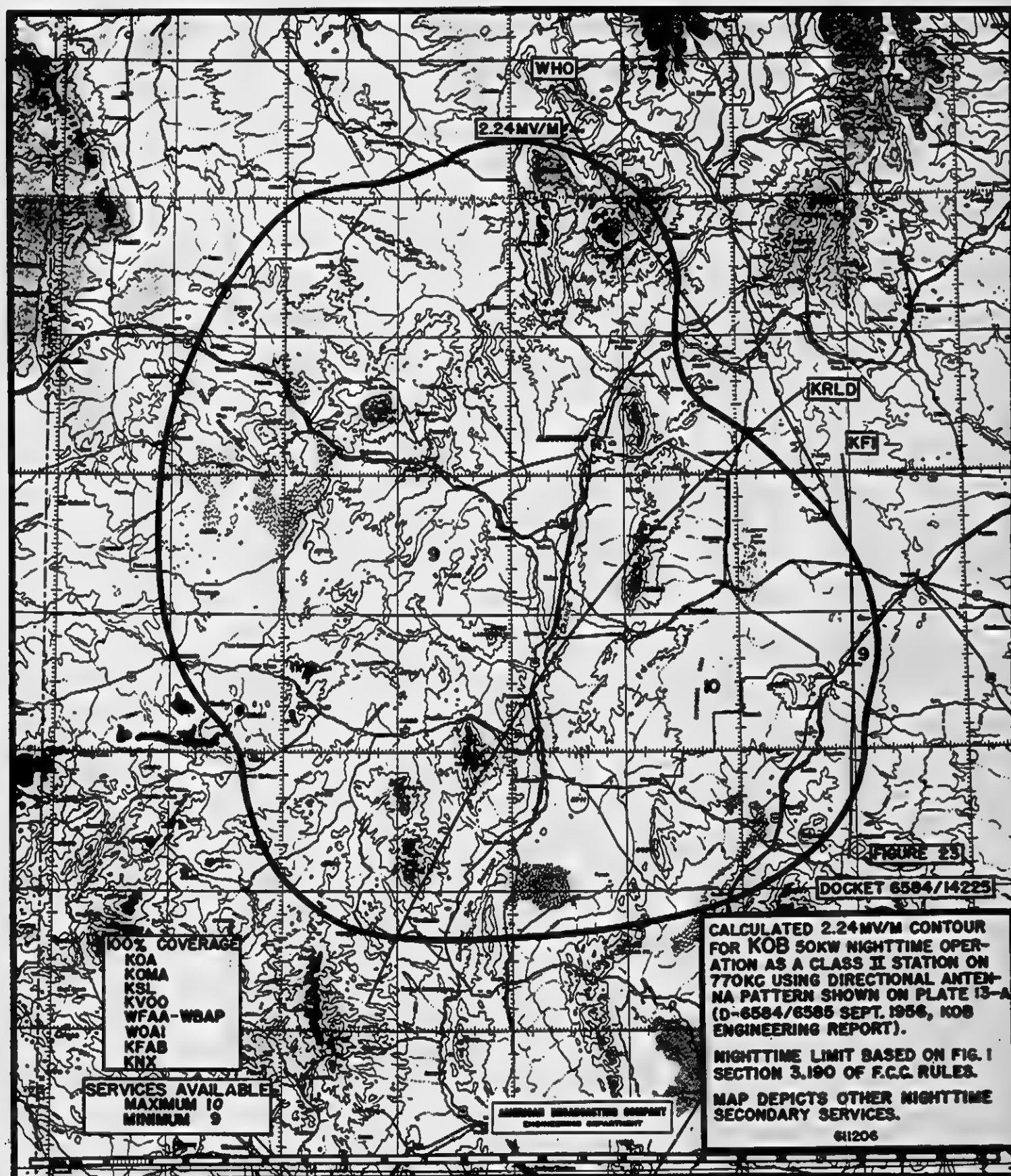


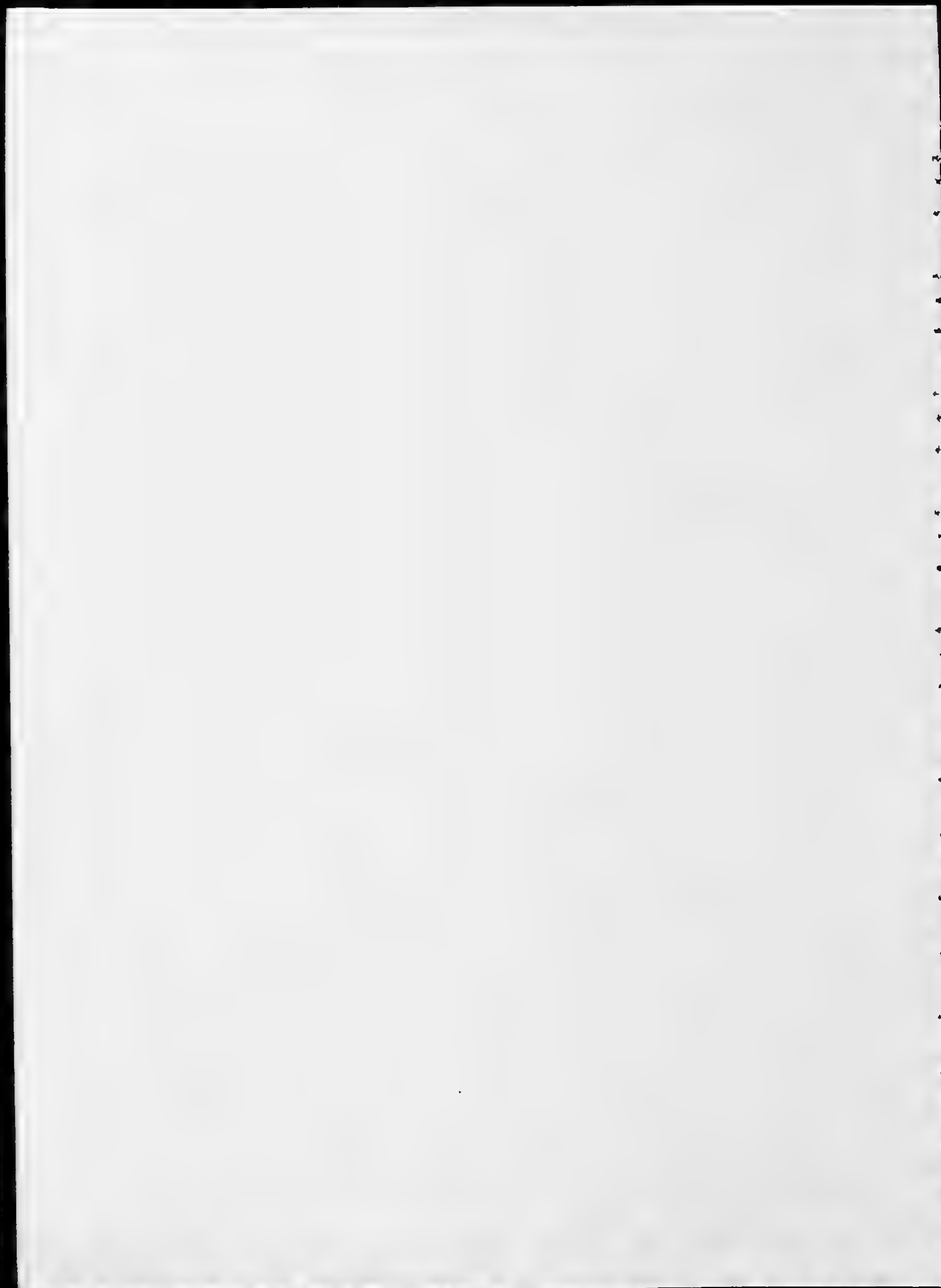
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POPULATION AND AREA SUMMARY  
FOR FIGURE 22

	<u>Population</u>	<u>Area (sq. mi.)</u>
KOB Primary Nighttime (0.5 mv/m) operating as Class I-B	525,694	72,330









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POPULATION AND AREA SUMMARYFOR FIGURE 23

	<u>Population</u>	<u>Area (sq. mi.)</u>
KOB 2.24 mv/m Contour operating as Class II	355,633	26,890

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TABULATIONS OF STATIONS

## Stations Providing Secondary Service to KOB Areas

<u>Frequency</u> (KC)	<u>Call</u>	<u>City</u>	<u>Power</u> (KW)	<u>Class</u>	<u>Net- work</u>
1110	KFAB	Omaha, Nebraska	50	I-B*	NBC
1530	KFBK	Sacramento, California	50	I-B*	CBS
640	KFI	Los Angeles, California	50	I-A	NBC
1510	KGA	Spokane, Washington	50	I-B*	ABC
810	KGO	San Francisco, California	50	I-B*	ABC
1120	KMOX	St. Louis, Missouri	50	I-A	CBS
680	KNBC	San Francisco, California	50	I-B	NBC
1070	KNX	Los Angeles, California	50	I-B	CBS
850	KOA	Denver, Colorado	50	I-B	NBC
1520	KOMA	Oklahoma City, Oklahoma	50	I-B*	----
1000	KOMO	Seattle, Washington	50	I-B*	ABC
1560	KPMC	Bakersfield, California	10	I-B*	ABC
1080	KRLD	Dallas, Texas	50	I-B*	CBS
1160	KSL	Salt Lake City, Utah	50	I-A	CBS
1500	KSTP	St. Paul, Minnesota	50	I-B*	NBC
1170	KVOO	Tulsa, Oklahoma	50	I-B*	NBC
820 )	WBAP	Fort Worth, Texas	50	I-A	NBC
) S					
820 )	WFAA	Dallas, Texas	50	I-A	NBC
830	WCCO	Minneapolis, Minnesota	50	I-A	CBS

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Ex. No. 1 WABC (Cont'd.)

1140

<u>Frequency</u> (KC)	<u>Call</u>	<u>City</u>	<u>Power</u> (KW)	<u>Class</u>	<u>Net- work</u>
1040	WHO	Des Moines, Iowa	50	I-A	NBC
1200	WOAI	San Antonio, Texas	50	I-A	NBC
1130	KWKH	Shreveport, Louisiana	50	I-B*	----
870	WWL	New Orleans, Louisiana	50	I-A*	CBS

\* Directional Antenna

(NOTE: KOB Basic NBC Affiliate)

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WABC RADIO NEWS AND PUBLIC AFFAIRS PROGRAMMING

The WABC Radio News and Public Affairs Department, in cooperation with the American Broadcasting Company Radio Network, offers an extensive array of news and public affairs programming.

Thousands of programs are presented each year which, by their content and appeal, can be classified in the news and public affairs category. Many of these programs are presented on a continuing hourly, daily, weekly or bi-weekly basis for a continuing understanding of world, national and local events and issues. Others are presented on a one-time or special series basis to serve a specific need during a particular crisis or special event demanding more penetrating coverage and analysis in particular areas.

WABC Radio News and Public Affairs programming has but one objective. That is to make WABC listeners well-informed, community-minded citizens who are concerned with world, national and local events and who can match their concern with facts and information permitting them to make intelligent decisions about the affairs which we all must face.

In the following pages, there are evidences of WABC News and Public Affairs activities. These activities include half-hourly news programs, a one-time address by the President of the United States urging the nation to take part in a Red Cross Fund Drive, a 9 hour and 20 minute program reporting the events of a national political convention, an 18

hour marathon program in which New York City doctors answered listeners questions about Cancer and many other programs of many descriptions. All of them are designed to achieve the objective outlined above. Evidence is included to suggest that WABC is indeed programming in the public interest.

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ABC NEWS DEPARTMENT - RADIO

Vice President in Charge:	James C. Hagerty
Vice President:	Thomas A. Velotta
Director of News and Public Affairs:	John T. Madigan
Assistant to the Director:	Daryl D. Griffin
Director of Special Events and Operations:	Donald G. Coe
Assistant to the Director:	Cecilia E. Fiore
Manager of Public Affairs:	Wiley Hance
Assistant to the Manager:	Theodore Metzger
National News Editor:	Tom O'Brien
WABC Radio News Director:	Jack Powers

DOMESTIC NEWS BUREAUS

WASHINGTON:	Robert H. Fleming - Chief of Bureau Lew Shollenberger - Director, Special Events and Operations
CHICAGO:	Con O'Dea - Manager
DETROIT:	Richard Femmell - Manager
LOS ANGELES:	Milt Fishman - Manager
PITTSBURGH:	Al Crouch - Manager
SAN FRANCISCO:	Victor Reed - Manager

COMMENTATORS AND NEWSCASTERS

## NEW YORK:

Anthony, Julian	O'Brien, Tom
Bergman, Jules - Science	Shadel, Bill
Crager, Joel	Sharp, Roger
Gardiner, Don	Sheehan, William
Griffith, Les	Silverman, Ed
Hayes, George	Swayze, John Cameron
Howard, Lisa	Van Horn, Arthur
Howe, Quincy	Vincent, Scott
Lacy, Ben	Woods, Charles
MacVane, John - U.N.	Yerxa, Fendall

## CHICAGO:

Dreier, Alex  
Harvey, Paul

## LOS ANGELES:

Allen, Don	Pinkley, Virgil
Hemingway, Frank	Sims, Jay
James, Ralph	Ward, Baxter
Weaver, Hank	

## SAN FRANCISCO:

Winter, William

## WASHINGTON:

Clapper, Peter - Capitol Hill  
Edwards, John  
Fleming, Robert - Bureau Chief  
McIntyre, William  
Morgan, Edward P.  
Nichols, David  
Lawrence, William H. - White House and  
Political Editor  
  
Lodge, Robert - Pentagon  
Rolfson, John  
Scali, John - State Department  
Shollenberger, Lew - Director, Special Events  
& Oprns.  
Whedon, Peggy - Producer

## BOSTON:

Canham, Erwin D.

## DETROIT:

Femmell, Richard

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C.

In re Applications of	)	
KSTP, INC. (KOB)	)	DOCKET NO. 6584
Albuquerque, New Mexico	)	File No. BMP-1738
For Modification of Construction	)	
Permit	)	
AMERICAN BROADCASTING-PARA-	)	DOCKET NO. 14225
MOUNT THEATRES, INC. (WABC &	)	File No. BR-167
Aux.)	)	
New York, New York	)	
For Renewal of Existing License	)	

Appearances

Frank U. Fletcher, Esq. and Edward F. Kenehan, Esq. (Spearman & Roberson) on behalf of KSTP, Inc. (KOB); Vernon L. Wilkinson, Esq. (McKenna & Wilkinson) on behalf of American Broadcasting-Paramount Theatres, Inc.; and Ernest Nash, Esq. on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER ASHER H. ENDE

[ 35 FCC 44-73 ]

Preliminary Statement

1. The instant proceeding involves conflicting applications of KSTP, Inc. (KSTP), licensee of Station KOB, Albuquerque, New Mexico, for modification of a construction permit so as to permit Station KOB to operate full time on the frequency 770 kilocycles with 50 kilowatts power, using a specified directional antenna system at night, and of American Broadcasting-Paramount Theatres, Inc. (ABC), licensee of Station WABC, New York, New York, for renewal of its present license which authorizes unlimited, non-directional operation on 770 kilocycles with 50 kilowatts power.



Background

2. The hearings herein, which were required by the Commission in its Memorandum Opinion and Order, released August 4, 1961 (FCC 61-981), which will hereafter be referred to as the August 1961 order, are but the latest and most recent stage of a long and complex proceeding. This matter had its origin in the displacement of Station KOB from a channel then assigned to it, because of the reallocation of frequencies under the terms of the North American Regional Broadcasting

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Agreement more than 20 years ago. In order to understand the present posture of the proceeding, reference should be made to the history of the matter which is summarized in Appendix A to the decision which the Commission adopted on September 3, 1958,<sup>1/</sup> hereinafter referred to as the September 1958 decision, after lengthy hearings. Briefly, in that decision the Commission concluded that the public interest would be served by permitting both Station KOB and Station WABC to operate full time on the frequency 770 kc with 50 kw power,<sup>2/</sup> each employing directional antenna at night in accordance with the parameters set forth in the decision,<sup>3/</sup> to provide the required protection against mutually destructive interference. In order to implement this conclusion, the Commission further decided to amend its Rules to provide for the assignment of two Class I stations on 770 kc.<sup>4/</sup> In addition, the Commission granted KSTP leave to amend its then pending Station KOB application to specify directional rather than non-directional operation on the frequency 770 kc with 50 kw power, and directed ABC to file its application for renewal of Station WABC's license some 11 months in advance of the expiration date of its then effective license.<sup>5/</sup> Finally, the Commission ordered the proceedings in the dockets then before it "to remain open for the purpose of considering further adjudicatory matters as may be based upon the orders herein directed to Stations KOB and WABC".<sup>6/</sup>

3. ABC appealed from the aforementioned decision and order of the Commission and petitioned for a review of the order. In the decision upon this appeal, hereinafter referred to as the 1960 Court decision,<sup>7/</sup> the Court affirmed the Commission's order with certain caveats and requirements. Specifically, the Court held that the Commission had not abused its discretion in limiting its consideration of where to accommodate Station KOB to two channels and did not err in not assigning Station KOB to the alternative frequency occupied by another licensee.<sup>8/</sup>

4. The Court ruled, however, that ABC should not be permanently prejudiced as a network; that ABC should be given a hearing on its claim that the loss necessary to provide KOB with a Class I frequency should be borne by some other broadcaster in the eastern part of the country;<sup>9/</sup> and that any failure by the Commission to give due consideration to ABC's claims for treatment comparable to that accorded other networks was reviewable by the Court.<sup>10/</sup> The Court held finally,

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<sup>1/</sup> In re Albuquerque Broadcasting Company, 25 FCC 683, beginning at page 794.

<sup>2/</sup> Id. at p. 793.

<sup>3/</sup> Id. at pp. 696 and 697 (paragraph 22 of the decision).

<sup>4/</sup> Id. at pp. 790 and 791.

<sup>5/</sup> Id. at p. 793.

<sup>6/</sup> Id. at p. 794.

<sup>7/</sup> American Broadcasting-Paramount Theatres, Inc. v FCC, 280 F.2d 631, 1960.

<sup>8/</sup> Id. at pp. 634-636.

<sup>9/</sup> Id. at pp. 635-636.

<sup>10/</sup> Id. at p. 636.

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that "we need not and do not pass on any contentions of the parties not here discussed".<sup>11/</sup>

5. In the meantime, while the aforementioned appeal from the Commission's decision was pending, KSTP sought and was granted leave, over ABC's objection, to amend its application in accordance with the parameters specified in paragraph 22 of the Commission's September 1958 decision. Station WABC filed, under protest, an application for renewal of its unexpired license, as directed in the Commission's September 1958 decision. However, it did not seek authority for directional operation in accordance with the parameters specified in paragraph 22 of that decision, but instead, sought the right to continue its non-directional operation on 770 kc. In February 1960 KSTP also filed a further application for authority to operate a radio station on 770 kc in New York City, specifying a directional antenna within the parameters set forth in the Commission's September 1958 decision. This application was directly competitive with the aforementioned renewal application of ABC.

#### The Instant Proceedings

6. As noted above, the instant proceedings were initiated pursuant to the Commission's August 1961 order. In it the Commission took note of: (a) the filings of KSTP and ABC; (b) of the fact that KSTP had petitioned for consolidation of the hearing on its amended application for Albuquerque and its application to operate in New York, with ABC's application for renewal of its existing Station WABC license; and (c) of ABC's opposition to the petition for consolidation. The Commission rejected the various contentions raised by ABC<sup>12/</sup> and denied the request of KSTP for a consolidated hearing on the three conflicting applications<sup>13/</sup> but stated it would afford KSTP a comparative hearing on its New York application if the instant proceeding were decided in favor of ABC. The Commission further indicated that, if the instant proceeding were decided against ABC, it might afford ABC a final

opportunity to file an application in conformity with the parameters of the September 1958 decision.

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11/ Ibid.

12/ On August 24, 1961, ABC filed a Petition to Clarify or Enlarge Issues to permit evidence to be taken on various matters. This petition was denied by Memorandum Opinion and Order of the Commission, released on October 16, 1961 (FCC 61-1197).

13/ KSTP sought court review of the Commission's August 1961 order insofar as it denied a consolidated hearing on the three applications. On motion of the Commission, this petition was denied and reconsideration thereof refused.

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7. The Commission also took note of the fact that, in its application, ABC requested continuance of WABC's non-directional operation on the frequency 770 kc and, therefore, in essence was asking for authorization contrary to the findings and conclusions reached in its September 1958 decision regarding the best way to resolve the 307(b) issue then before it. In this connection, the Commission ruled:

"... The findings of fact and conclusions of law reached therein (the September 1958 decision) are final and conclusive on the question concerning what type of operation on frequency 770 kilocycles would best effectuate the mandate of Section 307(b) of the Act; . . . " (See paragraph 11 of the August 1961 order).

The Commission stated,<sup>14/</sup> however, that it felt:

"... in view of the language contained in the opinion rendered by the United States Court of Appeals on May 27, 1960, that it would be appropriate at this time to reopen the record in Docket No. 6584 in order to consider any additional evidence to be presented by WABC with respect to its network position on the frequency 770 kilocycles and to determine in the light of such evidence whether the issue is such that it overrides the 307(b) determination

previously rendered by the Commission in its decision of September 3, 1958. Therefore, we propose to consolidate WABC's application (File No. BR-167) for renewal of license for hearing with KSTP's amended application (File No. BMP-1738) for Albuquerque, New Mexico, and to reopen the record in that proceeding for such limited purpose and for that purpose alone . . ."  
(See paragraph 11 of the August 1961 order).

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14/ The Examiner feels that note should be taken of the fact that this proceeding revolves around the assertion by a network that it has an intrinsic right as a network to be given a particular standard of treatment by the Commission vis-a-vis other networks. Furthermore, it is clear from the 1960 court decision referred to above that the Court agrees that this is an enforceable right. It might be interesting to speculate on the obligations networks assume to the Commission in return for the exercise of this right and the nature and extent, if any, of regulatory authority which the Commission might be deemed to acquire over networks qua networks as a result thereof. This is, of course, beyond the Examiner's scope in this decision, but it is felt that the matter should be pointed up for appropriate consideration should the occasion therefor arise.

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#### The Issues

8. In its August 1961 order, the Commission set this matter for hearing on the following three issues:

1. To determine in view of our findings and conclusions in Docket No. 6584 with respect to KOB's proposal and Section 307(b) of the Communications Act of 1934, as amended, whether the public interest would be served by a grant of WABC's application (BR-167) for renewal of license for its present facilities, or the application of KSTP, Inc. (BMP-1738) for Albuquerque, New Mexico.

2. To determine whether the consideration of providing facilities to the ABC Network in New York on a basis which is



fair and equitable in comparison with other radio networks should vary the conclusion with respect to issue 1, above.

3. To determine, in the light of our findings and conclusions in Docket No. 6584 and the evidence adduced pursuant to issue 2 above, which of the above-captioned and described applications should be granted.

9. However, despite the fact that it specified three hearing issues the Commission stated specifically:

"... No additional evidence will be permitted to be adduced under issue 1, infra, since, as stated above, our findings of fact and conclusions of law previously reached with respect to Section 307(b) of the Act are final and conclusive. The purpose of including this and issue 3 is simply to permit the Commission to take appropriate action upon the above-captioned applications in the light of the additional evidence to be adduced pursuant to issue 2." (See paragraph 11 of the August 1961 order).

The Commission further provided that the burden of proceeding with the introduction of evidence and the burden of proof as to issue 2 "shall be on American Broadcasting-Paramount Theatres, Inc."

#### The Hearing Herein

10. By order of the Chief Hearing Examiner released August 4, 1961 (FCC 61M-1330), the Hearing Examiner was designated to preside in this proceeding; a prehearing conference was scheduled for September 8,

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1961; and the hearing itself was scheduled for October 16, 1961. In accordance with the aforementioned order, the prehearing conference was held on September 8. During this conference, counsel for ABC made reference to the magnitude of the job confronting him in preparing for the case and suggested that December 15, 1961, be fixed as the date

for the exchange of exhibits in order to afford ABC the time it felt it needed to prepare to meet the burden of proceeding on the issues and the burden of proof. His request was granted and this date was fixed for the exchange of exhibits. The hearing itself was scheduled to begin on January 15, 1962, one month later.

11. Hearings were held on January 15, 16 and 22, 1962. The record was held open until February 2, 1962, for receipt of a KSTP exhibit and was closed on that date. At the suggestion of counsel for ABC, March 19, 1962, some two months after the close of the hearings, was fixed as the date for filing proposed findings and conclusions and briefs, and April 2, 1962, as the date for filing replies thereto. Proposed findings were, in fact, filed on behalf of ABC and KSTP, as well as the Commission's Broadcast Bureau. Reply findings were filed on behalf of KSTP and the Bureau. No reply findings were filed on behalf of ABC.

#### Position of the Parties

12. General: As has been indicated, the basic problems which gave rise to the proceeding are complex. The history of the matter is long and involved. The specific issue to be decided herein is unique. Under all of these circumstances the Examiner is of the opinion that, in fairness to the parties, their principal contentions should be set forth in some detail before being considered hereinbelow.

13. American Broadcasting-Paramount Theatres, Inc.: ABC filed extensive<sup>15/</sup> proposed findings and conclusions<sup>16/</sup>. ABC urges the following considerations in support of its position that issue 2 should be resolved in its favor:

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<sup>15/</sup> Thirty-three of the 89 pages in the ABC pleading were devoted to a "Preliminary Statement" in which ABC made a detailed presentation of its version of the background and history of this proceeding, and of the considerations which it felt led to the assignment of the frequency 770 kc to Station KOB. To the extent that the Examiner considers the background and history relevant, he has included it hereinabove under the caption "Background".

16/ In its proposed findings ABC makes reference to various matters which were adduced in evidence prior to the decision of the Commission In re Albuquerque Broadcasting Company, 25 FCC 683, and to various adverse rulings of the Examiner herein which it asks be reconsidered. Where appropriate, these matters will be dealt with in the findings and conclusions hereinbelow.

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(a) A network has a duty to provide a broad service to the American people; in executing this duty ABC budgets between 3-1/2 and 4 million dollars annually for programming, approximately 25 percent of which is not available for public sponsorship.

(b) Although it has been able to attract a greater number of affiliates (primarily daytime only stations) than either Columbia Broadcasting System (CBS) or National Broadcasting Company (NBC) it operates at a disadvantage vis-a-vis these older networks because it has fewer clear channel or full-time affiliates and such full-time affiliates as it has operate at lower power than do those of CBS or NBC.

(c) Because of its present inferior coverage at night, it has difficulty in obtaining and keeping nighttime network sponsors and is even now required to have lower basic charges for network news programs.

(d) Station WABC is the only heretofore dominant station on any of the Class I-A clear channels whose nighttime secondary service area is not being protected.

(e) At present Station WABC is its key or flagship station, which carries about 80 percent of the network produced programs exclusive of sustaining musical programs, and provides service to substantially the same areas as do the New York stations of CBS and NBC but that each of these networks has a greater number of affiliates providing primary service in the present Station WABC primary and secondary service areas, as well as a greater number of clear channel affiliates who provide a secondary service to these areas.

(f) Under the parameters of the Commission's September 1958 decision, Station WABC would suffer a net loss of 19 percent of its primary service area and 4 percent of the people in its primary service area as well as 60 percent of its secondary service area and 69 percent of the people in its secondary service area.

(g) About one-third of the persons in the secondary service area which Station WABC would lose have no primary nighttime service (white area) so that the network would be left with only two affiliates who would provide secondary service to all or part of such white area as against five to nine affiliates of CBS and three to ten affiliates of NBC who provide such service.

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(h) It is necessary to have more than two secondary services to make networks programs consistently available to a given area.

(i) Secondary service is important to sponsors and is included in all network coverage claims.<sup>17/</sup>

(j) The problems it now has in serving or keeping customers would be aggravated by the losses alleged, and the competing networks would certainly use this fact against it on every occasion to wean sponsorships away from it.

14. On the basis of the foregoing, it is urged that it be found as an ultimate fact that if ABC, whose network facilities are now allegedly inferior to those of the other two major networks, is required to directionalize Station WABC so that the latter loses 702,000 persons in its primary coverage and 17,214,000 in its secondary coverage while the identical coverage of New York stations of its two major competitors, WCBS and WNBC, is maintained intact, it would not provide facilities to the ABC network in New York on a basis which is fair and equitable in comparison with the other networks.

15. ABC then proposes that the Commission grant its application for renewal of Station WABC as a Class I facility on 770 kc with 50 kw,

and deny the application of KSTP for a Class I facility at Albuquerque, New Mexico, on that frequency but, as suggested by its counsel at the hearings herein, grant leave to KSTP to amend its application and request a construction permit and license for Station KOB as a Class II-A station on 770 kc, 50 kw (U, DA-N).

16. KSTP, Inc.: KSTP takes the basic position that the fair and equitable criterion specified in issue 2 requires consideration of the ability of the networks to compete not only as to physical facilities, but also as to programming, sales and revenue producing opportunities. Insofar as the physical facilities and coverage areas are concerned, KSTP apparently does not challenge the losses which ABC alleges would result from the implementation of the Commission's September 1958 decision. It does point out that, insofar as secondary service is concerned, the area to be lost by Station WABC now receives more than 23 other secondary services and that at least 11 stations provide secondary service to 90 to 100 percent of the area and no particular area would have less than 12 other such services. While further admitting that the facilities available to ABC in New York City under the Commission's

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17/ It is pointed out that some 25 million persons or about 13 percent of the country's population live in "white areas", yet the networks claim coverage of between 95 and 97.6 percent of all American homes.

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September 1958 decision would be different from those available in New York to CBS and NBC, KSTP alleges that such difference in facilities does not in itself justify a conclusion that unfair and inequitable treatment of the ABC network vis-a-vis other networks would result.

17. KSTP then turns its attention to the matters of programming, sales, and revenue producing opportunities. In this connection, it is alleged that there is no evidence of record to indicate the extent to



which the facilities of Station WABC are used to broadcast ABC programs during either the daytime or the nighttime; that there is no evidence of record to indicate whether the network is operating at a profit or a loss or the extent to which Station WABC contributed thereto. KSTP, therefore, argues that in the absence of evidence to show the impact, if any, of the reduction in the nighttime service areas of the network, it is idle to speculate on the financial effects thereof or on the ability of ABC to compete with the other networks.

18. As a further offset to the contentions of ABC, it is pointed out that the network not only has more affiliates (397) overall than either CBS or NBC, but also claims more affiliates in the top 200 markets in the United States than any other network. KSTP calls attention to the fact that, in making sales presentations, the ABC network lays emphasis upon the "total coverage" which can be provided by the group of stations to carry the proposed program, with no distinction being made between primary and secondary service areas of any of the facilities involved, including Station WABC. In this connection, it is alleged that ABC network sales manager, called as a witness herein, had never until immediately prior to his testimony seen any figures on secondary or skywave coverage of Station WABC. Insofar as the importance of multiple secondary services to a particular area is concerned, it is pointed out that in making sales presentations the ABC network does not advise potential advertisers that more than one affiliate will provide secondary service to a particular area where the network does not have primary coverage.

19. On the basis of the foregoing, KSTP recommends that it be concluded that ABC has failed to meet the burden placed upon it and that the conclusion previously made should not be varied. It is, therefore, urged that the application of KSTP be granted and that of ABC be denied. It is further urged that the failure of ABC to make even a prima facie showing under issue 2 should preclude a finding that it would be in the public interest to permit ABC to now pursue an application for directional operation of Station WABC.

20. The Broadcast Bureau: The Bureau, as did ABC, devotes a considerable portion of its proposed findings to the history and background of the proceeding. The Bureau points out that ABC requested and was given three months after the prehearing conference to prepare

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its exhibit and an additional month to prepare for the hearing so that it had ample time to produce evidence, if available, to show the effect, if any, upon network operations if Station WABC were required to directionalize. The Bureau then asserts that the ABC engineering exhibits, to the extent admitted over Bureau objections, merely furnished data as to area and population losses to Station WABC, if required to directionalize, and the other services available to these areas from stations affiliated with ABC and the other networks, all of which the Commission knew and considered in its September 1958 decision. The Bureau alleges that ABC failed to translate this loss by Station WABC to an effect upon the network. Instead, the Bureau contends the ABC witnesses "contributed some speculations as to the effect of WABC's clear channel authorization upon network time sales".

21. The Bureau also calls attention to what it considers admissions by ABC's witnesses. Thus, it points out that ABC's vice-president in charge of network radio sales could not recall what he learned of the coverage and facilities of Station WABC; that prior to coming to Washington to testify he never saw specific figures on ABC's secondary coverage; that this witness admitted that most ABC time purchases are on a saturation basis; and that virtually no sponsor buys time for the evening hours alone but that to a great degree the basic pattern of radio network sales is to tie-in nighttime with daytime sales. The Bureau points to the fact, as did KSTP, that ABC stresses "inside coverage" and not secondary service and that ABC contends this "inside coverage" is superior because it gets more acceptance and believability than do outside stations whose signals may reach into a local market.

22. On the basis of the foregoing, the Bureau urges it be found that whatever the usefulness of secondary service may be to the public in underserved or isolated areas, its usefulness, if any, as an element of network competition or operation cannot be shown to exist by reliable evidence. It is further alleged that ABC, although afforded every opportunity to bring in such evidence, did not adduce any. The Bureau, therefore, proposes it be concluded that: (a) the Commission should not vary its decision that the public interest would best be served by a grant of KSTP's application and (b) ABC's application for renewal of Station WABC's existing license be denied.

#### Findings

23. General: Before proceeding to evaluate the conflicting contentions of the parties in the light of the evidence of record, it appears to the Examiner it would be useful and conducive to a clearer understanding of the issues to delineate the exact scope of the proceeding before him. In this connection, it is perhaps as important to be aware of what the proceeding does not encompass as of what it does encompass. First of all, this is not a full-fledged or comprehensive

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proceeding pursuant to the provisions of Section 307(b) of the Communications Act of 1934, as amended (Act)<sup>18/</sup> to determine ab initio to which of two communities the frequency is to be allocated. Secondly, this is not a rule making proceeding to determine whether there should be one or more Class I stations on the frequency 770 kc. Thirdly, it is not a comparative proceeding to determine which of two applicants should be licensed to operate on a particular frequency.

24. The Commission itself made it very clear that it had reached final conclusions on the basic 307(b) question (see paragraph 7, supra), and that it would authorize two Class I operations on the frequency at issue (see paragraph 2, supra.) The Commission further made it clear

that the proceedings herein were designed to afford ABC the opportunity, to which the Court held it was entitled, to be heard on the question of whether its position as a network was being permanently prejudiced because it was being forced to share a clear channel, while other networks were being given full use of clear channels.<sup>19/</sup>

25. This is, however, a hearing wherein the issue is clearly limited and defined. As set forth above (see paragraph 9, supra), the Examiner may not take any evidence with respect to the 307(b) issue but can only permit evidence to be adduced for the record with respect to issue 2, the determination of whether consideration of providing facilities to the ABC network in New York on a basis which is fair and equitable in comparison with other radio networks should vary the conclusion with respect to issue 1 above, i.e., the 307(b) issue heretofore described.<sup>20/</sup> (See paragraph 8, supra, for text of the issues).

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<sup>18/</sup> This Section provides as follows:

"In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

<sup>19/</sup> American Broadcasting-Paramount Theatres, Inc. v. FCC, 280 F. 2d 631, 634-5.

<sup>20/</sup> It is to be noted that the Commission, in affording ABC the hearing on the issue specified herein, actually went further than the Court required. The Court upheld the Commission's 307(b) conclusion and the Commission's right to license both Stations KOB and WABC as Class I stations on 770 kc with directional antenna at night in accordance with the parameters set forth in the Commission's September 1958 decision. The Court indicated only that ABC had the right to be heard on its claim that the public interest required "that the loss of service in the East which Class I broadcasting from Albuquerque produces, be absorbed by some eastern broadcaster other than WABC". Herein, ABC is

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As a consequence of this limitation, the Examiner rejected offers of evidence (and now reaffirms such rejection), from ABC regarding the Station KOB service area if it were to operate in accordance with the parameters set forth in paragraph 22 of the Commission's September 1958 decision, or in accordance with certain other proposals advanced by ABC. The Examiner also refused to admit evidence with respect to certain selected items of programming carried by Station WABC during a particular period.<sup>21/</sup>

26. ABC attempted to elicit testimony from a witness that the network was operating "in the red". Objection to this line of testimony was sustained and ABC was afforded an opportunity to submit actual

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<sup>20/</sup> (continued from previous page)

not required to contest with another eastern broadcaster for another frequency but is afforded a further opportunity to demonstrate that it should remain the sole possessor of 770 kc as a Class I clear channel. It is recognized, of course, that as a concomitant of this right, ABC has imposed upon it the burden of demonstrating that the adverse effects upon it as a network flowing from the Commission's decision are such that the public interest would better be served by a reversal of the determinations made by the Commission in its September 1958 decision than by the adherence to that decision. Whether or not ABC would still have the right under the aforementioned decision of the Court to contest with another eastern broadcaster for another clear channel frequency should the holding in the instant proceeding be adverse to it is not, of course, within the ambit of the issues before the Examiner. The Examiner desires, however, to make it clear that this initial decision is in no way designed to pass on that question. The Commission might, should this decision reach it for review, desire to address itself to this question if it appears appropriate in light of the findings and conclusions the Commission reaches on such review.

<sup>21/</sup> This programming was allegedly offered in answer to a possible "so what" question regarding the nature and calibre of the programs handled by the ABC network. The Examiner might note that, if this evidence had been offered on another theory, i.e., a showing of the quality of the programming available via ABC network facilities with its present operations and earnings as against a different quality of programming and, therefore, ability to attract sponsors and advertisers



and ultimately serve the public interest, which would be available should the Commission's September 1958 decision regarding the licensing of Station KOB as a Class I station be permitted to stand, the Examiner's ruling would have been different. This is so because such an offer would have been clearly relevant to the issue under consideration, namely the provision of facilities to ABC fair and equitable in comparison with other networks. However, no such offer was made and no such theory of the case was advanced. Therefore, the ruling is reaffirmed and the reconsideration requested by ABC is denied.

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figures so that the other parties could examine the basis upon which the conclusion had been made. After reviewing this matter, in the course of a recess of several days, given ABC at the request of its counsel, ABC determined not to introduce such evidence. The request for reconsideration of this ruling is also denied. It appears to the Examiner that the impropriety of a broad brush conclusion of this type without substantiating factual evidence, particularly from a witness who was qualified as vice-president in charge of programming for the network, is too clear to require further comment.

27. Finally, certain evidence regarding the areas of service of stations owned by Westinghouse, Inc., was also rejected on the ground that Westinghouse was not the type of network contemplated by the Commission's issue and, further, that this network did not operate out of New York. In the proposed findings where it requested reconsideration of this ruling, ABC made reference to the Court's decision wherein it was indicated ABC should be allowed to show that some other eastern broadcaster should absorb the loss resulting from the grant of Class I status to Station KOB. In the opinion of the Examiner, such a showing would probably be appropriate in a proceeding designed to determine what other frequency on a clear channel might be assigned to Station WABC. It is not, however, appropriate to the instant proceeding.<sup>22/</sup>

28. The foregoing discussion makes it clear that the issue before

the Examiner is strictly limited and is confined to a determination of two basic questions. The first is the "fair and equitable facilities" question in comparison with other networks. The second, which arises if it is determined that the ABC network is not provided facilities on a basis which is fair and equitable in comparison with other networks, is whether such unfairness and inequity is sufficient to outweigh the public interest considerations which led the Commission to reach its September 1958 decision to license Station KOB as a Class I station on 770 kc in accordance with the parameters set forth in paragraph 22 of such decision.

29. A question may arise now as to what is meant by the clause "providing facilities to the ABC network". In this connection it is to be noted that the Court in its 1960 decision stated that it did not believe that "the position of ABC as a network should be

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<sup>22/</sup>In its proposed findings ABC also made reference to tower problems it might encounter if it were required to directionalize and to a substantial capital outlay which it allegedly would be required to make to acquire and build on a new site. No evidence with respect to this matter was adduced at the hearing and the references were to testimony at previous hearings. The Examiner rejects such proposed finding as not properly within the ambit of the issue before him and also because the Commission found heretofore: "It is not established by evidence of record that WABC's present site either is or is not feasible for directional operation." (25 FCC 683, at p. 741).

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permanently prejudiced by forcing it to share a channel", etc.<sup>23/</sup> It is also clear in reaching its decision the Court had before it the contentions of ABC that, if the Commission's September 1958 decision were implemented, "network competition would be unduly restricted".<sup>24/</sup>

30. Under these circumstances, it would appear to the Examiner that the issue herein to be determined relates to the effect of the September 1958 decision on ABC as a network. Furthermore, it must

relate to more than mere physical facilities available to serve particular areas or populations as against those available under an implementation of the September 1958 decision. ABC must demonstrate for the record that the changes in the areas and in the populations Station WABC would reach adversely affect its ability to compete as a network or unduly restrict network competition so that its position as a network is or may reasonably be expected to be "permanently prejudiced". Finally, under the doctrine of the Sanders Brothers' case,<sup>25/</sup> as interpreted in the Carroll case,<sup>26/</sup> ABC should translate its private damage or prejudice to damage to the public interest such as a diminution or destruction of service.<sup>27/</sup> ABC can, in the opinion of the Examiner, meet the burden placed on it either by demonstrating a loss to the network of such a large area and/or audience that reasonable men must inevitably conclude its position and ability to serve in the public interest are prejudiced, or by showing directly that whatever loss is suffered will cause it to lose sponsors for network programs or network advertising to a substantial degree and thereby sufficiently weaken its position so as to prevent it from competing as effectively as it does now, and, therefore, from providing service in the public interest.

31. Before turning to the specific contentions of the parties, one final observation should be made. The changes required to implement the Commission's September 1958 decision relate to nighttime service only. Daytime service over Station WABC would continue as at present. All discussion hereafter should, unless specifically stated, be deemed to relate to nighttime contours, nighttime areas of service and nighttime audiences.

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<sup>23/</sup> 280 F.2d 631, 635 (emphasis supplied).

<sup>24/</sup> Ibid. (emphasis supplied).

<sup>25/</sup> FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940).

<sup>26/</sup> Carroll Broadcasting Company v. FCC, 258 F.2d 440 (1958).

<sup>27/</sup> Id. at p. 443.

32. The ABC Network: At the time of the hearing, ABC had 397 affiliates, a greater number than either CBS or NBC.<sup>28/</sup> According to the record, its affiliates have been improving over the last year both as to quality and number of stations. In addition, the average affiliate is now clearing more programming for the network than at any time in the network's recent history. Although ABC was unable to specify exactly how many, it appears that a large number of ABC's affiliates are daytime only stations. ABC is conscious of the needs of its daytime affiliates as well as the needs of its small station affiliates. It was testified without contradiction that it programs so as to provide a daytime as well as nighttime service; so as to assist stations which do not have facilities for local programming; and so as to provide smaller stations with responsible programming acceptable to them. ABC cited as an example of the network's activity in this field a memorial to the great harpist, Carlos Salzedo, which it felt only its good music affiliate would use. Finally it appears, according to the uncontested testimony of record, that ABC spends 3-1/2 to 4 million dollars on its network programming annually to provide a broad service to the American people and that nearly all of its public affairs programs and 25 percent of its overall schedule are carried as a public service and are not available for sponsorship.

33. On the other hand, the record shows that ABC does not have as many clear channel or full-time affiliates as do CBS and NBC and that it lacks full-time affiliates in many major markets. In addition, many affiliates operate with less power than do those of CBS and NBC. Finally, ABC does not claim to cover as many homes with its network service, its figures being 95 percent of all American homes as against 96.8 and 97.6 percent, respectively, for CBS and NBC. ABC contends that all of these factors place it at a disadvantage, even now, in competing with the other networks. It cites several examples of problems it encountered in "selling" certain programs to sponsors and

advertisers, and alleges that the problem of its inferior nighttime coverage is brought up time and time again by national sponsors desirous of maximum coverage. ABC further contends that, because of its lesser coverage it is required to sell news on the ABC network for \$1,000 for five minutes as against \$1,200 on CBS and NBC.

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Although ABC included data as to the facilities of the Mutual Broadcasting System in its engineering exhibits, it did not make any comparisons between ABC and that network in its proposed findings. Reference to the data of record, the fact that Mutual does not have owned and operated stations and the fact that Station WOR, shown in the ABC exhibits as located in the New York area, is no longer a Mutual affiliate, would all indicate that ABC is not claiming prejudice vis-a-vis that network. Accordingly, no further consideration will be given that network in the comparisons and analyses made herein.

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34. Although ABC faces certain problems, as indicated, it is not without compensating advantages, which it utilizes fully. In its presentation<sup>29/</sup> to potential sponsors, it stresses its superiority in local coverage, with outlets in 152 of the top 200 markets in the country as against 128 such outlets for its nearest competitors.<sup>30/</sup> It also emphasizes that its coverage of the local market exceeds the average of all other networks by some 24 percent. ABC points out that it not only covers 95 percent of all U. S. homes, but that the coverage "is strongly supplemented" by its dominance over the other networks in local coverage, which it calls "inside market" coverage. It argues that, since it has more local affiliates which are an integral part of and centrally located in the communities:

"... they generally get more acceptance and believability from programming and commercials than do outsider stations whose signals may reach into a local market."

35. This then is the present status of the ABC network. It suffers



certain disadvantages in competing with CBS and NBC, and has certain advantages. Its disadvantages would generally appear to encompass the normal problems<sup>31/</sup> facing the latest entry into the field,<sup>32/</sup> and do not appear to have handicapped it materially in its growth in the number and quality of affiliates or undermined its general competitive position. In view of this and in the absence of any precise data

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<sup>29/</sup> There is only one exhibit in the record showing a presentation made by ABC which it admitted, however, was "typical" of those made by the network.

<sup>30/</sup> This claim is as of April 1960. In view of the testimony referred to hereinabove about its growth in the last few years, it is possible that its lead in this respect is greater today than it was then.

<sup>31/</sup> The examples cited by the ABC witness cannot be accepted as proof of an inherently inferior position but rather indications of problems that normally arise in any competitive enterprise. Furthermore, the fact that they were for the most part resolved in favor of advertising over ABC suggest that the network can maintain its position in its present posture.

<sup>32/</sup> No conclusive findings of competitive inferiority can be made because ABC charges less for a basic five-minute news program than do the other networks. There is no showing that the differential applies to all or to any other programs, or that it does not represent the attempt of the newest network to compete with its older, better established rivals in the historical manner available in our society, i.e., to attract customers by giving them a "better buy".

which would show ABC's financial situation either absolutely or in comparison with CBS or NBC,<sup>33/</sup> there is no basis for a finding that it is in a precarious situation or that it could be seriously affected by even a minor change in coverage or revenues. It is further impossible to make findings as to whether ABC is operating at a profit or loss and, further, whether the situation with respect to CBS and NBC is the same as or different from that which obtains with respect to ABC.

36. Present Status of Station WABC: At present Station WABC, wholly owned and operated by ABC, broadcasts as a 50 kw station on 770 kc, and Station KOB is required to protect substantially its 0.5 mv/m 50 percent nighttime contour. The Commission, in its September 1958 decision, proposed that both stations be required to directionalize so as to protect each other in accordance with the parameters set forth in paragraph 22 of that decision. In this connection, ABC calls attention to the Commission's Report on the Clear Channel Broadcasting proceedings<sup>34/</sup> and points out that, under the Report, the clear channel stations of the other networks would not be treated in the manner the Commission proposed to treat Station WABC in its September 1958 decision. It is true that neither Station WCBS, the CBS station in New York nor Station WNBC, the NBC station in New York, would be required to directionalize under the Clear Channel Broadcasting Report.<sup>35/</sup> There is no doubt, then, that ABC has established it is being treated differently from the way which CBS and NBC are being treated insofar as network facilities via their respective owned and operated stations in New York are concerned. There now remains to be determined whether ABC has demonstrated that the results which will or may reasonably be expected to flow from this difference in treatment are sufficient to require or justify a finding that ABC, as a network, is not provided with facilities in New York on a basis which is fair and equitable in comparison with other networks.

37. Effect on ABC as a Network - General: The record shows that at present, the nighttime 0.5 mv/m 50 percent skywave contour of

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<sup>33/</sup> Although afforded the opportunity to do so, including time to consider the matter during a recess of several days, ABC failed to produce acceptable evidence regarding the financial position of the network, its present earnings picture or its prospects. In addition, no data was even offered for the record regarding the financial position of CBS or NBC.

<sup>34/</sup> 31 FCC 565 (1961).

<sup>35/</sup> While the aforementioned Clear Channel Report contemplates

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authorization of a Class II station on the frequency now occupied by Station WCBS in New York, such Class II station will be required to protect the present 0.5 mv/m 50 percent nighttime skywave contour of that station. No duplication of the frequency of Station WNBC is presently contemplated in the 48 contiguous states of the Union.

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Stations WABC, WCBS and WNBC encompass about the same area. If Station WABC were to directionalize in accordance with the parameters in paragraph 22 of the Commission's September 1958 decision, it would have the following effect upon its area of service and the populations therein:

<u>Primary Service Area</u> <sup>36/</sup> (0.5 mv/m groundwave)	<u>Area</u> (Square Miles)	<u>Population</u>
Present	19,270	17,707,715
Proposed	15,410	17,005,389
Net Loss	3,860 <sup>37/</sup>	702,326 <sup>38/</sup>
Net loss as a percent of present	20%	3.5%
<u>Secondary Service Area</u> <sup>39/</sup> (0.5 mv/m 50% skywave)		
Present	489,210	24,957,798
Proposed	197,770	7,743,950
Loss	291,440	17,213,848
Loss as a percent of present	59.6%	69.0%

<sup>36/</sup> Primary Service Area is defined (47 CFR 3.11 (a)) as follows:

"The term 'primary service area' of a broadcast station means the area in which the groundwave is not subject to objectionable interference or objectionable fading."

<sup>37/</sup> This net loss of 3,860 square miles is the end result of a gross loss of some 4,807 square miles in the area to the west of New York City and a gain of some 947 square miles primarily in the area to the north of New York City.

<sup>38/</sup> This net loss of 702,326 people is the end result of a gross loss of 976,699 persons in the gross loss area and a gain of 274,473 people in the gain area. (The correct figure should, therefore, be 702,226).

- 39/ Secondary Service Area is defined (47 CFR 3.11 (b)) as follows:  
"The term 'secondary service area' of a broadcast station means the area served by the skywave and not subject to objectionable interference. The signal is subject to intermittent variations in intensity."

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38. It is to be noted that while neither of them challenge the accuracy of the ABC figures, both the Broadcast Bureau<sup>40/</sup> and KSTP<sup>41/</sup> argue that the mere showing of a loss in area or population is not sufficient to sustain the burden placed upon ABC. They allege that in the absence of any showing of losses of revenues or other adverse financial effects, ABC has not demonstrated that it is prejudiced or its competitive position injured. The Examiner does not believe that this matter can be dismissed that simply. It would appear that, if a network demonstrates that it, as a network has, in fact, been deprived of a service area and audience equal to approximately 10 percent of that available in the entire country, it may well have made a prima facie showing of prejudice and adverse effect vis-a-vis its competitors who are not similarly deprived. It is, therefore, necessary now to analyze the data submitted by ABC to determine whether the network, as a network, will in fact lose a service area and listeners to the extent indicated.

39. Station WABC's Service Areas: It appears to the Examiner that in order to meet the burden placed upon it as to the possible effects of an implementation of the September 1958 decision on the ABC network rather than on Station WABC as such ABC should have shown first the nature and extent of the network programs carried by Station WABC during the hours it would be required to directionalize. If, for example, Station WABC ordinarily did not carry any ABC network programs during this period, it would be difficult to conclude that the network lost any audience. Secondly, ABC should have shown whether it has other affiliates which also provide the same service as does Station WABC to

40/ The Bureau further alleges that the Commission was aware of this loss and considered it in its September 1958 decision. Such consideration, however, related to the 307(b) question, not to the competitive position of ABC vis-a-vis other networks. In other words, in its earlier decision the Commission held that 307(b) considerations indicated that it was more in the public interest to provide service to those who would gain from licensing Station KOB than to protect the service for those now within the Station WABC service area. Here the question is whether the loss would prejudice the ABC network as against other networks.

41/ KSTP calls attention to the fact that the secondary service area to be lost by Station WABC would have from 12 to 24 other secondary sky-wave services and 11 stations would provide such service to 95 to 100 percent of the area. This is irrelevant to the present issue. What is at issue herein is not what other services from sources other than ABC the area will have, but whether ABC as a network would have available its own or its affiliates' facilities to serve the area on a fair and equitable basis. If in fact ABC were not to have facilities or affiliates to serve the area to be lost by Station WABC whereas the other networks have a total of 11 to 23 such facilities, ABC's case would be strengthened rather than weakened.

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the area under consideration. To the extent that there are such affiliates, it cannot be concluded that a showing of loss to Station WABC necessarily proves an automatic loss of an equivalent service area or audience to the network. The third thing which ABC should have demonstrated is that, even though it has local affiliates in the area lost to Station WABC, or clear channel affiliates capable of providing a secondary service to such area, such affiliates do not, to a significant degree, carry the network programs which are carried on Station WABC and that, therefore, the network, even though it has other affiliates, is deprived of an opportunity to compete for the audiences. As a final alternative ABC might have shown that the people in the areas which have the local affiliates which carry ABC network programs or which receive secondary service from other ABC affiliates carrying



such programs do not listen to them for network programs, but prefer to receive such programs over the facilities of Station WABC. Each of these matters will be considered in the succeeding paragraphs. For convenience, however, item two which relates to other affiliates will be considered last as it involves primary and secondary areas of service where differences in service provided by affiliates may exist.

40. ABC did not offer any detailed evidence of the extent to which Station WABC has carried or would carry ABC network programs during the nighttime hours if it were to suffer the above-described primary and secondary service losses by being required to directionalize.<sup>42/</sup> There is testimony in the record to the effect that Station WABC carries about 80 percent of all the ABC network programs exclusive of sustaining musical programs.<sup>43/</sup> There is, however, no evidence of the hours during

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<sup>42/</sup>As noted above, an exhibit proposed by ABC relating to selected programs broadcast by Station WABC was not accepted but remained as an offer of proof. A review of this offer of proof shows that, if it were accepted for the limited purpose of showing the nighttime ABC network programs transmitted by Station WABC, it would not be helpful, as aside from programs clearly identified as Station WABC programs, it only shows nine programs broadcast on Sundays after 6 p.m., some of which are obviously not network programs; one ten-minute daily program (5 days a week) which may be a network program; and well over 100 individual programs broadcast between January 8, 1960 and October 15, 1961. While many or even most of the individual programs may have been network programs, some were clearly not and others are in the doubtful category. In any event, they cover about 100 hours over a 21 month period when about 2,500 to 3,000 hours of broadcast time between nightfall and midnight were available.

<sup>43/</sup>In the offer of proof testimony it was stated that Station WABC carried all network news programs. For purposes of this facet of the case this testimony is accepted.

which the 80 percent of the network programs carried by Station WABC are transmitted by that station, nor what proportion of the total programs of the network are sustaining musical programs nor when such programs are offered by the network. Finally, there is no evidence as to how much of the total programming of the network is nighttime programming. In view of the fact that Station WABC transmits 80 percent of the network programs exclusive of sustaining musical programs, it is reasonable to conclude that some portion of the programming transmitted includes nighttime network programs, but the extent thereof cannot be determined from the record.<sup>44/</sup> Under these circumstances it is found that ABC has not demonstrated the extent to which it will lose network facilities as a means of transmitting its programs to persons in those parts of the present Station WABC service areas which that station would no longer reach.

41. The next factor to be considered in evaluating possible loss to the network is whether the other ABC affiliates which provide service to the areas to be lost by Station WABC carry network programs at night to the same extent as does Station WABC. ABC did not submit any specific data as to the extent to which its other affiliates carry or fail to carry network programs at night. The only evidence in this respect is a statement by the vice-president in charge of programming for the ABC radio network that:

"The average station in our line-up is clearing more programming for the network than it ever has in our recent history, to my knowledge."

In view of the foregoing, there is no basis for a finding that the other affiliates of the network do not, to a substantial degree, carry network programs which are carried on Station WABC, and there is also no basis for finding that the network, even though it has other affiliates, is deprived of an opportunity to compete for audiences in their service areas to the extent they overlap areas which would be lost to Station WABC.

42. Thirdly, ABC offered no evidence whatever regarding the extent to which, if at all, the persons in the nighttime service areas which would be lost to Station WABC listen to ABC network programs on that station, or listen to such programs on that station in preference to the other affiliates of ABC serving them. On the contrary, ABC stresses the fact that where it has local affiliates they "are an integral part of, and centrally located in these communities, and that they

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44/ A further complicating factor arises from the fact that approximately 25 percent of all ABC network programs and the vast majority of its public affairs programs are not available for sponsorship. Thus, if the 80 percent of the network programs carried by Station WABC include all of the public affairs programs and other non-sponsored programs, then Station WABC carries only 60 percent of the network programs which are sponsored.

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generally get more acceptance and believability from programs and commercials than do outsider stations whose signals may reach into a local market". There is, therefore, no basis whatever for a finding that people in the areas served by the other affiliates of ABC listen to Station WABC rather than such other affiliates.

43. It is now appropriate to consider the extent to which ABC as a network has affiliates in both the primary and secondary service areas to be lost by Station WABC if the Commission's September 1958 decision were to be implemented.

44. Other Network Affiliates in the Station WABC Primary Service Area to be Lost: The record shows that three ABC affiliates provide primary service to parts of the area in which Station WABC would be required to discontinue primary service under the September 1958 decision. These are: Station WFIL, Philadelphia, Pennsylvania, a Class III-A station operating at night with 5 kw power using a directional antenna on the frequency 560 kc; <sup>45/</sup> Station WEEU, Reading, Pennsylvania, a Class II station operating at night with 1 kw power,

with directional antenna on the frequency 850 kc; <sup>46/</sup> and Station WILM, Wilmington, Delaware, a Class IV station operating at night with 0.25 kw power on the frequency 1450 kc. <sup>47/</sup>

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<sup>45/</sup> A Class III station is defined in the Commission's Rules (47 CFR 3.21 (b)(1)) as follows:

"A Class III station is a station which operates on a regional channel and is designed to render service primarily to a principal center of population and the rural area contiguous thereto..."

<sup>46/</sup> A Class II station is defined in the Commission's Rules (47 CFR 3.31 (a)(2)) as follows:

"A Class II station is a secondary station which operates on a clear channel . . . and is designed to render service over a primary service area which is limited by and subject to such interference as may be received from Class I stations. Whenever necessary a Class II station shall use a directional antenna or other means to avoid interference with Class I stations and with other Class II stations, in accordance with Sec. 3.182 (and Sec. 3.22 in the case of Class II-A stations) . . ."

<sup>47/</sup> A Class IV station is defined in the Commission's Rules (47 CFR 3.21 (c)(1)) as follows:

"A Class IV station is a station operating on a local channel and designed to render service primarily to a city or town and the suburban and rural areas contiguous thereto. The power of a station of this class shall not be less than 0.1 kilowatt, and not more than 0.25 kilowatt nighttime and 1 kilowatt daytime, and its service area is subject to interference in accordance with Sec. 3.182."

45. ABC did not introduce any evidence to show the population within the primary service contours of the aforementioned three affiliates, which overlap the area to be lost by Station WABC (overlap area). Some general idea of the magnitude of the population involved can, however, be obtained by reference to the United States Census Report for 1960. <sup>48/</sup> This indicates that the Standard Metropolitan Statistical Area <sup>49/</sup> of Philadelphia, which is served by Station WFIL, had a 1960 population of 4,342,897 with slightly over 2,000,000 people

residing in the central city and some 2,340,000 residing outside the city, while that of Reading, which is served by Station WEEU had a population of 275,414 with 98,000 residing in the central city and some 117,000 residing outside of it. Finally, according to the aforementioned Census Report, the 1960 population of the Wilmington urbanized area<sup>50/</sup> served by Station WILM, was some 283,667 people. There is no way to determine from the record as it now stands the exact population in the overlap areas of Stations WFIL, WEEU and WILM. The charts show that, in the case of Philadelphia, the overlap is relatively small, including perhaps 10 or 15 percent of the Station WFIL primary service contour. In the case of Reading, it is larger, including perhaps 40 or 50 percent of the Station WEEU contour. In the case of Wilmington, the entire service contour of Station WILM is in the overlap area. However, even if only a small proportion of the over 4,900,000 people residing in the areas which might reasonably be expected to be served by the three stations are in the overlap area they could compensate for all or substantially all of the net loss<sup>51/</sup> claimed by Station WABC in its primary service area.<sup>52/</sup>

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<sup>48/</sup> U.S. Bureau of Census, U.S. Census of Population: 1960. Number of Inhabitants, United States Summary. Final Report PC(1)-IA. U.S. Government Printing Office, Washington, D.C., 1961.

<sup>49/</sup> See definition of Standard Metropolitan Statistical Area on page xxiv of the above-cited Census Report.

<sup>50/</sup> See definition of "urbanized area" on page xix of the above-cited Census Report and the definition of a Class IV station cited above. It is to be noted that, while in the case of Stations WFIL and WEEU which operate as Class III and Class II stations with considerable power, the larger standard metropolitan statistical area population figures were used, whereas in the case where the Class IV Station WILM, with much less power was involved, the smaller urbanized area population was used.

<sup>51/</sup> As set forth above, see paragraph 37 and footnotes 37 and 38, *supra*, Station WABC would suffer both gains and losses in the primary service area. The population gain from the change in contour would be 274,473 while the population loss would be 976,699.



<sup>52/</sup> As noted above, the net loss in primary nighttime service area to be suffered by Station WABC was calculated at 702,326. This is only 14.3 percent of the aforementioned 4,900,000 referred to as living in the standard metropolitan statistical or urbanized areas.

46. The Examiner is aware, of course, that the foregoing calculations do not provide the basis for a firm finding as to the exact number of people living in the area which would lose primary nighttime service from Station WABC, who would be served by the three ABC affiliates. The Examiner is, however, of the opinion that the data he outlined do negate ABC's contention that the ABC network would lose access to 702,326 persons because Station WABC lost such access to them. It must be found, therefore, that ABC has not demonstrated that, as a network, it would suffer the loss of primary nighttime service to 702,326 people or that, in fact, there would be a net loss of service by the network to any substantial number of people. This finding is supported by the aforementioned position taken by the ABC network that "inside coverage" by local stations is more important than coverage by distant powerful stations.

47. WABC's Secondary Service Area<sup>53/</sup> - General: The Examiner feels that, before considering the effects of the implementation of the Commission's September 1958 decision on the ABC network insofar as the secondary nighttime service area of Station WABC is concerned, it would be useful to consider the nature, extent and quality of service to a secondary service area. A secondary service area is defined in the Commission's Rules (47 CFR 3.11 (b)) as one which is "subject to intermittent variations in intensity". It is further stated in the Rules (47 CFR 3.182 (h)(i):

"... The secondary service is necessarily subject to some interference and extensive fading whereas the primary service area of a station is subject to no objectionable interference or fading. . ."

48. Secondary or skywave service has been characterized as "variable", "subject to fading" and "intermittent" with "signals that vary in intensity often from minute-to-minute".<sup>54/</sup> The Commission itself summarized the situation with respect to secondary service in its September 1958 decision when it stated:

"... while secondary service, as indicated above, is the only kind that is available in many parts of the country, it is at best not a totally satisfactory service, and not to be compared in quality or dependability with primary service. . ." (25 FCC 683, p. 782).

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<sup>53/</sup> For convenient reference, that part of the secondary service area which Station WABC would cease to serve upon implementation of the Commission's 1958 decision will be called the "differential area".

<sup>54/</sup> Clear Channel Broadcast Stations, Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 8210, etc., 87th Cong. 2nd Sess., Testimony of Chairman Minow, pp. 231 and 232, February 13, 1962.

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Because of the above-described characteristics of secondary service the Commission has over the years had a goal of providing at least one primary service to as much of the population of the United States as possible.<sup>55/</sup> The basic importance of secondary service results from the fact that, despite such efforts, more than one-half the land area of the United States inhabited by over 25 million people does not today receive primary service (white area), and will probably never receive such service for both technical and financial reasons.<sup>56/</sup>

49. In view of the foregoing, it appears to the Examiner that the following findings may properly be made with respect to primary and secondary service insofar as they relate to the matter at issue:

(a) Where a network has affiliates which provide primary service to an area and other affiliates which provide secondary service to the same area, it may reasonably be assumed in the absence of

convincing evidence to the contrary that, where both types of affiliates carry the same network programs, the listener will choose the primary rather than secondary service to receive the network programs;

(b) Where there is no primary service available in a white area then the secondary services of the network are to be deemed competitive with other secondary services available in the white area; and

(c) Where the network has affiliates which provide only secondary service to an area and other networks or non-network stations provide primary service to the area, it cannot be assumed that the network has any substantial audience in the area but, instead, it is incumbent on the network to demonstrate that a substantial number of persons prefer its programs and actually listen to them via the secondary service, and listen to them to any meaningful extent, rather than to the programs of others available via primary service.

50. In applying the foregoing findings to the differential area, the following further findings may be made:

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<sup>55/</sup> Id. at p. 231

<sup>56/</sup> Ibid.

(a) Station WABC would, upon implementation of the Commission's September 1958 decision be required to discontinue service to an area of 291,440 square miles or 59.6 percent of its pre-existing secondary service area, and would no longer provide secondary service to 17,213,848 persons or 69 percent of the people residing in its pre-existing secondary service area;

(b) The ABC network, however, has other means of serving this differential area as follows:

(i) In all some 43 affiliates provide primary service to various parts of the differential area; and

(ii) Two affiliates provide secondary service to substantially all or to a large part of the differential area.

(c) ABC has not shown for the record the extent, if any, to which Station WABC carries network programs which are not also broadcast by the 43 affiliates providing primary service in the differential area or the two affiliates providing secondary service to the differential area (see paragraphs 40 and 41, supra).

(d) ABC has not demonstrated that there is any basis for believing that people residing in those parts of the differential area which are within the primary service contours of affiliates of ABC listen to Station WABC rather than to the local affiliates (see paragraph 42, supra).

(e) ABC has also not demonstrated that people residing in that part of the differential area where it has two other affiliates which provide a secondary service prefer to listen to Station WABC rather than the other affiliates, and no such preference can be assumed (see paragraph 42, supra).

(f) Both CBS and NBC have more affiliates than does ABC and these affiliates provide primary service to larger portions of the differential area than do the ABC affiliates. In addition, both CBS and NBC have more affiliates than ABC which provide secondary service to the differential area. Between five and

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nine provide such secondary service in the case of CBS and between three and ten in the case of NBC as against one and three, at present, for ABC.<sup>57/</sup>

51. Consideration may now be given to the question of the extent to which the ABC network, as a network, would lose an opportunity to reach the persons in the differential area should the Commission's September 1958 decision be implemented.

52. Differential Area - Primary ABC Service: ABC did not offer any specific evidence regarding the number of persons or the square miles in the differential area which are within the primary nighttime service contours of ABC network affiliates. It did allege in its proposed findings that "only a small portion (estimated visually at less than 20%) of the so-called differential area . . . receives a primary service at night from any other stations associated with ABC". On this basis, it urged a finding that ". . . approximately 80% of the 17,200,000 persons in the differential area . . . are thus dependent on skywave signals for the nighttime programs of the ABC radio network . . ."

53. As noted above, the record shows that the ABC network has some 43 affiliates which provide primary nighttime service in the differential area. While it may be true that the combined primary service areas of such affiliates approximate 20 percent of the differential area, it does not follow that the persons served by such affiliates comprise only 20 percent of the population of the differential area. The record shows that these 43 stations include one Class I-A station, two Class II stations, twenty-one Class III stations and eighteen Class IV stations. The Class II and III stations are located in such heavy population centers as Pittsburgh, Pennsylvania; Columbus, Ohio, Indianapolis, Indiana; Akron, Ohio; Wilkes-Barre, Pennsylvania;

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57/ ABC proposed that it be found that, if either CBS or NBC were required to directionalize their respective New York stations in accordance with the parameters of paragraph 22 of the Commission's September 1958 decision, persons in the differential area dependent on secondary service for network programming would still continue to have more sources from which to receive CBS or NBC network programs than they presently have for those of the ABC network. It appears that this is so. However, the issue here is not whether CBS or NBC should suffer the loss resulting from the licensing of Station KOB but whether the



present position of the ABC network is affected to such an extent vis-a-vis other networks as to require a reversal of the determination heretofore made to license Station KOB as set forth in the September 1958 decision. The superiority of CBS and NBC in this field is a factor, however, to be considered in evaluating the effect of the implementation of the Commission's September 1958 decision on ABC as a network and will be discussed hereinbelow when ultimate findings are made.

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Erie, Pennsylvania; Fort Wayne, Indiana; and Augusta, Georgia. <sup>58/</sup>  
Reference to the U.S. Census figures cited previously indicates that the eight cities referred to above have a combined population of over 5 1/4 million people. The other 33 cities (excluding Chicago and Milwaukee), in which ABC has affiliates providing primary service, have a combined population of over 2 1/2 million. Thus, it is clear that the 20 percent figure computed by ABC on the basis of a visual estimate understates considerably the population in the nighttime primary service areas of the ABC network affiliates. In fact, instead of 20 percent of 17,200,000 or 3,440,000, it appears that even excluding any allowance for the net primary coverage by the Chicago affiliate, Station WLS, to the heavily populated northwestern part of Indiana or of the Milwaukee affiliate, Station WISN, the nighttime primary service areas of the affiliates probably encompass some 7,000,000 to 8,000,000 people and conceivably could include as many as 9,000,000 people.

54. Under these circumstances, there is no doubt that ABC seriously underestimated the number of persons in the differential area who receive primary nighttime service via the facilities of its affiliates, and its proposed finding that 80 percent of the 17,200,000 persons in the differential area are dependent on skywave signals for nighttime programs of the ABC radio network is rejected. It is, instead, found that the persons receiving primary service are not only substantially in excess of the 3,440,000 estimated by ABC, but probably exceed twice that number and may approach three times that many. In view of the superiority of primary over secondary service it is clear that,

to the extent network programs are carried over both Station WABC and those local affiliates, the population in these areas must be deemed to listen to the local affiliates. Since there is no basis for finding that these programs are not carried by the local affiliates, it is found that these 7,000,000 to 9,000,000 persons are not lost to ABC as a network (see paragraphs 40-42, 49 (a) and 50 (c) and (d), supra). There now remains for consideration the 8,000,000 to 10,000,000 people in the differential area who receive no primary service from any ABC affiliate.

55. Differential Area - No ABC Primary Service: At present, ABC network service to that part of the differential area, where it has no affiliate which provides primary service, is available in whole or in part only through the secondary or skywave signals of three affiliates. These are, in addition to Station WABC, Station WLS, Chicago, a Class I-A station operating unlimited time with 50 kw and which, with a very minor exception in the extreme southern part, provides a

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58/ The Chicago Class I-A station and Milwaukee Class III-A station affiliates have not been considered here because: (a) the Chicago station overlaps several other stations so there is no way to make a reasonable estimate of the population in that part of the differential area served by this station; and (b) only a small part of the primary service area of the Milwaukee station is included in the differential area.

secondary service to the entire differential area; and Station KXEL, Waterloo, Iowa, a Class I-B station operating with directional antenna at 50 kw which provides a secondary service to what ABC estimates to be about 65 percent of the differential area. Thus, it is clear that if the Commission's September 1958 decision were to be implemented, ABC would not be deprived of access to this part of the differential area but, rather, that the number of secondary signals it could put over it would be reduced from 3 to 2 for about 65 percent of this area, from 2 to 1 for about 35 percent of this area and from 1 to 0 to a fraction of 1 percent of this area.

56. ABC argues, however, that because of the "intermittent and fading characteristics" of secondary service this reduction would have a serious effect upon it. It alleges that its expert witness whose qualifications in this field were admitted and whose testimony was not challenged, testified that the greater the number of stations, preferably geographically separated, that serve an area, the greater the likelihood of continuous coverage.<sup>59/</sup> It is to be noted that, in eliciting this line of testimony counsel for ABC called the witness' attention " . . . to the white areas in here which we are primarily interested in that have no primary service". In evaluating this argument the Examiner will first limit his consideration to "white areas" and then, because in the proposed findings ABC broadened its request to encompass all of the differential area in which ABC does not have affiliates providing primary service,<sup>60/</sup> will consider that facet too.

57. White Area: Before passing upon ABC's contentions with respect to the white area the Examiner feels he should evaluate the validity of the figures used by ABC regarding the extent thereof and the population therein. ABC alleges that such white area totals 113,701 square miles and contains 5,667,808 persons. The record does not indicate exactly how ABC arrived at the foregoing figures. It is to be noted, however, that in its September 1958 decision the Commission made reference to the fact that "4,675,300 persons in 123,170 square miles do not have any nighttime primary service available" (25 FCC 683,781). Reference to the figures cited by ABC indicates that some four years later; the white area had been decreased from 123,170 square miles to 113,701 square miles, or by 7.7 percent. However, ABC alleges that in this same period the population in the white area increased by 992,508 persons, from 4,675,300 to 5,667,808, or by some 21.2 percent. The Examiner finds this surprising, particularly in view

59/ It is noted that in its findings ABC alleged that the witness testified that "one or two skywave signals are insufficient to assure continuous coverage to 'white areas' at night". No page reference is given for this alleged testimony and, upon reading the record, the Examiner can find no such testimony.

60/ See paragraph 55 of the Proposed Findings of Fact and Conclusions of Law filed by ABC.

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of the fact that the United States Census Report for 1960 cited above, shows on page S 20, figure 24, entitled "Percent of Change in Total Populations by Counties: 1950-1960", that the population in the counties which, according to ABC exhibits comprise the white area, has, for the most part, decreased considerably between 1950 and 1960, in many instances in excess of 20 percent. Accordingly, the Examiner doubts the accuracy of the population figures attributed to the white area by ABC and must find that ABC has not demonstrated that the white area has a population of 5,667,808 people or any number approaching that. On the other hand, it must be admitted that there is a very considerable number of people in the large white area which exists. For example, using the data testified to by the Chairman of the Commission at the hearing on Clear Channel Broadcast Stations (see footnote 54, supra), to which several references have been made by ABC in its proposed findings, and assuming an even distribution of population in the white areas, the population of this area under consideration would appear to be somewhat in excess of 1,875,000 people. 61/

58. In view of the uncontradicted testimony of the ABC witness referred to in paragraph 56, supra, it may be found that ABC as a network would not, as a technical matter, be able to assure the same continuity of signal over the white area inhabited by at least 1,875,000 people without the facilities of Station WABC as it would with such facilities available as they are at present. It must, however, be determined whether this decrease in the ability to provide such continuity

of signals so, prejudices the position of ABC as a network that the Examiner is required to, or justified in finding that it is being deprived of facilities which are fair and equitable in comparison with the other networks.

59. In considering this matter it is to be noted first that the Commission has already decided this basis 307 (b) problem in its September 1958 decision (see paragraphs 25 and 26 of its Conclusions therein, 25 FCC 683, at pp. 781-783). The Court on appeal has upheld

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- 61/ This figure results from the following computations:
- (a) It was testified that more than half the land area of the United States (a total area of 3,022,000 square miles), inhabited by more than 25 million people, has no primary service;
  - (b) The white area involved herein (113,701 square miles), is equal to 7.5 percent of the total white area in the United States (1,511,000 or one-half of the total area, 3,022,000 square miles); and
  - (c) Application of this 7.5 percent to the over 25 million people in white areas in the United States, would indicate that there are at least 1,875,000 people in the white area involved herein and probably more as population densities are usually greater in eastern and east-central parts of the country than elsewhere.

the Commission's decision in this respect. 62/ Finally, the Commission has indicated that its decision in this respect is final and has prohibited the Examiner from taking any further evidence in this matter (see paragraphs 7 and 9, supra). Thus, the Examiner is not concerned here with the effect upon persons in the white area who would lose access to ABC programs via Station WABC. The Examiner is, instead, concerned only with the effect upon ABC, as a network, of its inability to transmit its network programs to this area via Station WABC. In order to enable the Examiner to make the findings it seeks in this respect, ABC should have demonstrated on the record by a preponderance of probative evidence that its inability to carry its network programs over Station WABC and thus provide the additional secondary service with the



attendant improved continuity to this white area will adversely affect the ability it now has to attract sponsors or advertisers to a measurable degree; that this reduction in revenues will affect its network operations so it will no longer compete as effectively as it now does and will generally not be able to provide programming to the public of the same quality and calibre that it now does.<sup>63/</sup>

60. Turning now to the specific matters under consideration it is to be noted that a considerable portion of the testimony adduced on behalf of ABC regarding the importance of secondary service was given by its vice-president in charge of programming for the radio network rather than by officials responsible for sales. Although this official stated that presentations made to sponsors are both written and oral, and cover both primary and secondary service, he admitted that he did not know what portion of the secondary coverage of the network was allocated to the secondary coverage of Station WABC. He also stated that, while he participated in most presentations to affiliates, his participation in sales efforts was characterized by him as including "a good number of sales presentations in New York. But I would not say in a majority of such presentations". Further regarding the importance of secondary coverage, the record shows that the vice-president of the network in charge of sales, who testified at some length regarding certain specific problems encountered by the network, could not recall what he had learned, as a salesman for the network, about the characteristics and coverage of Station WABC, other than it was a 50 kw clear channel station. In addition, he admitted that no one other than present counsel for ABC had informed him as to the characteristics of WABC's coverage before he came to testify in this proceeding. Finally, he admitted that before counsel for ABC showed him the material offered in evidence herein he had never seen any figures as to the secondary service or coverage of Station WABC. This witness also testified that,

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<sup>62/</sup> American Broadcasting-Paramount Theatres, Inc. v. FCC, 280 F. 2d 631 at p. 635

63/ As indicated in paragraph 30, supra, the touchstone of Commission action is the public interest and the burden is upon the private entity to show that damage to its private interests results in damage or harm to the public interest.

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generally, the network made at least three oral presentations for every written presentation to prospective advertisers, and described these presentations as follows:

"Well, basically what is contained in the presentation is a generic rundown on the ABC Radio Network, the specific property or program we are trying to sell to a prospective advertiser, and the reasons that we feel as a network it is a good advertising vehicle for this prospective advertiser in that it might meet his marketing pattern in stations by market, by audience levels, in other words, by an audience composition breakdown that might better coincide than our competitors, or some other media with the particular product he has to sell, the audience figures, the efficiency figures, a station line-up -- this is basically what goes into a presentation."

It is to be noted that no mention is specifically made in this statement as to secondary service or coverage.

61. The Examiner notes, in connection with the alleged importance of secondary services to the ABC network or its owned and operated stations, that an exhibit on this subject, which is part of the advertising used by Station WABC to secure sponsors, relates entirely to its primary coverage with no mention whatever of the almost 25,000,000 people in its secondary service area,<sup>64/</sup> stressed so much in this proceeding. The Examiner also notes that, although the sales vice-present of the radio network testified, as set forth above, that in presentations to potential sponsors the network supplies data by market, by audience level, by audience breakdown, all designed to show efficiency, no such data were submitted in this record with

respect to secondary service of Station WABC. In fact, there is no analysis whatever of the market represented by the persons in the white area, no data whatever on audience level or any audience figures whatever, and certainly no efficiency figures. ABC did not in any way attempt to translate the potential audience to an actual audience or to prove that any people in that area do in fact listen to the network. Yet, this according to its own sales expert is basic to any presentation ABC makes to a sponsor or advertiser whose business it is seeking. It is reasonable to assume that, if such data were available to prove the ABC contentions, they would have been offered. All of this indicates to the Examiner that, despite its contentions herein, ABC does

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64/ The exhibit shows the Station WABC primary service contour and states:

"WABC -- New York's first station -- is owned and operated by the American Broadcasting Company. With 50,000 watts clear channel non-directional, on 770 kilocycles, WABC covers the most heavily populated area in the United States. Well over 22 million people live within the WABC 0.5 mv/m area."

not rely particularly on secondary service as an important factor and does not use it as an important tool in securing advertising sponsors or revenue for the network.

62. The aforementioned failure to stress secondary service could perhaps be better understood if it were to be viewed in terms of the general ABC approach to network sales as indicated in the record herein. ABC has apparently geared its sales approach to the areas in which it excels, namely, the inside market. It emphasizes the customer acceptability and the importance of local coverage and by implication deprecates "outsider stations" whose signals reach into the local market. Thus, in the only exhibit in the record relating to a presentation made by ABC which it admitted was "typical" of those made by the network,

a passing reference is made to ABC's coverage of 95 percent of the homes and great stress is placed on the aforementioned local coverage (see paragraph 34, supra). The markets are analyzed in great detail and the superiority which ABC enjoys in the number of local outlets therein is emphasized. In this proposal ABC sets forth four different plans containing nine different programs or groups of programs for consideration by potential sponsor. It is interesting to note that, despite the alleged inferiority of ABC in secondary service, five of the alternatives suggest programs which are to be transmitted at 6:50 p.m., New York time or later, three relate to full sponsorship of weekend programs apparently to be broadcast several times daily, and only one relates to a daytime program. Even in a presentation seeking national nighttime sponsorship then, ABC relies on its local coverage which it analyzes in detail to convince the potential sponsor and makes only passing mention of the total coverage of the network.

63. Perhaps even more relevant in the consideration of the practical as against the theoretical effects of reducing the number of stations providing secondary network coverage in the differential area is the fact that ABC will still be able to claim the same 95 percent coverage of all homes that it now does. This is so because Station WLS covers practically all of the differential area except for a very small part in the extreme southern portion which ABC indicated is only a fraction of one percent of the differential area. This loss would not change the 95 percent national coverage claim by a measurable amount, and the network could still properly state that it has a coverage of this magnitude. Furthermore, it was testified that, in making a presentation to potential advertisers and discussing coverage, the network does not call attention specifically to the fact that secondary coverage to a particular area will be provided by more than one network station. Under these circumstances it is clear that loss of Station WABC secondary service to the differential area will not require a change in either total coverage claims or specific presentations to the extent they are made with respect to secondary coverage. For example,

the presentation analyzed above could still be made exactly as it was when Station WABC had its present coverage. The Examiner, therefore, finds that the loss of secondary coverage by Station WABC would not decrease the number of persons ABC could claim to reach by secondary service and would also not aggravate the present problems, to the extent which they may confront the network, with respect to nighttime coverage.

64. ABC argues further, however, that other factors must be considered. It alleges that, because of local commitments, talent conflicts or failure of a sponsor to order a given station, a number of programs on the ABC network may not be carried by a particular affiliate or even by a wholly owned and operated station. It is contended that, if for any of the foregoing reasons either Station WLS or Station KXEL were not ordered or failed to carry a program, the network would be substantially blacked out in much or all of the differential area.

65. There is no doubt that to the extent both Station WLS and KXEL do not ordinarily carry network programs which Station WABC does carry, then upon implementation of the Commission's September 1958 decision the network would not reach those portions of the differential area where it has no affiliate providing primary service. The difficulty with this argument, however, lies in the failure of ABC to give probative substance to theoretical possibility. As set forth above, it offered no data whatever as to the extent to which Station WABC carries network programs not carried by Stations WLS and KXEL.<sup>65/</sup> An ABC witness did cite one instance where a talent conflict prevented Station WLS from carrying a network program handled by Station WABC. However, this witness also testified that this was rare on the national level. The other instances cited by the witness as specific examples of problems encountered by ABC would not, however, be affected by the implementation of the September 1958 decision. In each instance the network could point to coverage in the differential



area by Station WLS and Station KXEL even if Station WABC would no longer provide it.

66. In view of all of the foregoing, the Examiner cannot find, on the basis of the evidence of record, that ABC has demonstrated that factors such as local commitments, talent conflicts or failure of sponsors to order particular stations, would have any substantial or even measurable effect upon network coverage by secondary service in the differential area.

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65/ In this connection, it is noted that Station WABC apparently carries a very considerable amount of non-network programming specifically keyed to the Greater New York Metropolitan Area because in its advertising the station claims: "WABC with its carefully chosen personality programs, reaches this great potential with personalized, local salesmanship. The personalities are nationally known entertainment figures, yet they sell the WABC market with a sales approach tailored to the realities and tastes of the greater New York metropolitan area." (emphasis supplied).

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67. Finally, in evaluating the effects of the implementation of the Commission's September 1958 decision on the network and on its coverage, it must be remembered that only nighttime coverage will be affected. Daytime network coverage will remain intact. ABC's vice-president in charge of sales admitted that, at present, to a great degree the basic pattern of network radio selling is to "tie-in" nighttime sales with daytime sales. He further stated that, aside from one program w hich he had described, ABC did not have any network sponsor who buys time only during the evening hours "s/imply because the majority of purchases now are on a saturation basis".

68. ABC has apparently keyed its approach to advertisers to the above-described pattern. Since, apparently most such network advertising is done on a "saturation" basis, ABC stresses that portion of the advertising day where it has what it feels to be a clear advantage, namely, the daytime transmission in the 200 top markets. It attempts to

convince potential sponsors or advertisers that its superiority in "inside" coverage by local affiliates is the key factor and is the one which will give such advertiser the best results. Its competitors quite naturally stress those areas where they have superiority and do not miss an opportunity to call attention to the "matter of ABC's inferior nighttime coverage". Furthermore, if Station WABC were to lose secondary coverage to some 17,200,000 people there is no doubt, as alleged by ABC, ". . . such fact would certainly be used on every occasion by those networks to wean sponsorship away from ABC". However, in evaluating the effects of such action by competitors in terms of the issue before the Examiner, it must be remembered that, at present, ABC suffers an overall disadvantage in the number of clear channel and full-time affiliates generally and that, in the differential area under consideration herein, its secondary coverage is even now far inferior to that of either CBS or NBC. It would appear to the Examiner, in the absence of evidence to the contrary, that those advertisers who are primarily concerned with the number of secondary signals a network can place over an area<sup>66/</sup> would even now choose CBS or NBC, each of which provides at least three times as many such secondary signals to the differential area. ABC has not demonstrated why there is cause to believe that an advertiser who considers the number of secondary services to an area important would consider using ABC today when the ratio is at least three to one against it, but upon loss of the Station WABC signal would be "weaned" away by a four or five to one ratio against that network. It seems more logical to find that the advertiser who is impressed by, or whose needs are better served by, "inside" coverage of the greater number of station affiliates of ABC would continue to choose that network. The advertiser who is impressed by, or better served by, the greater number of clear channel and full-time

66/ It is to be noted that there is no such evidence in the record. In fact such evidence as there is indicates that no specific mention is made of the number of secondary services available to a particular area.

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affiliates with higher power would even now choose one of the other networks in preference to ABC. In those instances where the advertiser cannot determine which he prefers he probably will do what an ABC witness described on the record as now taking place in at least one case - namely, a split of the advertising between ABC and another network - with ABC getting a somewhat larger share of the advertising dollar.

69. The Examiner, therefore, finds that it has not been demonstrated that an increase in superiority by competitors in an area where such competitors already have overwhelming superiority would affect ABC's ability to procure advertisers or sponsors. Accordingly, it cannot be found that upon implementation of the Commission's September 1958 decision ABC would, to any significant degree, lose sponsors or fail to attract new sponsors or advertisers to the extent it now does.

70. The comments and findings heretofore made with respect to the "white area" residents apply with even more force to those parts of the differential area which receives primary service from stations which are not ABC affiliates. As set forth above (see paragraph 49 (c), supra), because of the superiority of primary over secondary service it cannot be assumed, in the absence of evidence to the contrary, that any substantial number of persons will listen to programs via such a secondary service. ABC introduced no such evidence at all. Therefore, it cannot be found that there is any audience for ABC network programs in this area at present. Furthermore, even if it be assumed that such audience now exists, it cannot be found that such audience would in any way be diminished because of a loss of Station WABC secondary service and reliance on the secondary services of Station WLS and/or Station KXEL.

71. The Examiner can now turn to the ultimate question before him -- whether implementation of the Commission's September 1958 decision would permanently prejudice the ABC network by depriving it of network facilities which are fair and equitable in comparison with its competitors. It has already been found that this issue relates to more than physical facilities and encompasses the ability of the network to compete for advertiser sponsors and revenues to the end that it may serve the public interest. Furthermore, it patently does not involve a determination of whether, upon implementation of the September 1958 decision, ABC would, in absolute terms, be in a position inferior to that of the other networks, but rather the question of whether its present competitive position would be adversely affected to a meaningful degree. In other words, what has to be determined is whether the status quo of the network, whatever that may be, would be adversely affected.

72. As has been found above, ABC made an affirmative decision not to furnish acceptable evidence regarding its financial position

so that there is no basis upon which it can be held that it is operating at a loss, or is in a precarious financial situation, or that it would be seriously affected by even a minor change in revenues. To the contrary, the evidence it offered showed that the number and quality of its affiliates have been improving over the past year and that it has more affiliates than either CBS or NBC. Simple logic indicates that numerous and higher quality stations would not seek affiliation with a network on the downgrade, nor would they clear more programming for a network not able to compete effectively.

73. While at first blush it might appear that the losses to Station WABC of the magnitude involved herein require a finding that ABC has made a prima facie case, and analysis of the evidence of record demonstrates that this is simply not the case herein. It may well be true that Station WABC would lose access to the primary and secondary

coverage areas and the population as alleged by ABC. However, ABC has not demonstrated that it, as a network, would likewise lose such access. The Examiner has found that: (a) ABC has not shown that it, as a network, would lose access to a substantial number of persons in the present Station WABC primary service area; (b) ABC has seriously underestimated the number of people in the differential area who receive primary service from local affiliates; and (c) ABC has seriously overestimated the number of persons in the white area. Furthermore, ABC has not demonstrated the extent to which, if any, its affiliates do not carry network programs carried by Station WABC or that listeners, for some reason, prefer to listen to Station WABC and would not listen to the identical programs over other affiliates' stations which serve the same area. The only loss which may be deemed to be proved is the decrease in secondary service by the network to persons in the differential area from the present 2 or 3 to 1 or 2 (with a small fraction of one percent losing all such service). However, ABC has failed to translate even this decrease in coverage to possible effect on sponsors, advertisers, revenues or ability to present programs in the public interest. It is not unreasonable to find in view of the length of the time this case has been pending, the vehemence with which it has been argued, the time given ABC to prepare for the proceedings that, if the evidence required to prove its case were available, it would have been presented for the record. ABC demanded an opportunity to prove that it would be permanently prejudiced in that it would be deprived of fair and equitable facilities in comparison with other networks. It was afforded this opportunity but proved only that it would be treated differently, not that it would be permanently prejudiced by such difference, not that it would be unduly hampered in network competition, and not that it would be deprived of facilities which are fair and equitable in comparison with the other networks.



74. In view of the foregoing, the Examiner finds ultimately in light of the record before him, that ABC is not deprived of facilities which are fair and equitable in comparison with other radio networks.

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In view of this finding it is unnecessary to consider the second part of the issue, that is whether the conclusion reached by the Commission in its September 1958 decision should be varied.

75. The Examiner notes that KSTP requested that it also be found that it would not be in the public interest to permit ABC to now pursue an application for directional operation of Station WABC. This is beyond the scope of the issues before the Examiner. However, attention is called to this matter so that the Commission may, if it so desires, address itself thereto in light of the evidence here adduced should this Initial Decision come before it for review.

#### Conclusions

76. In view of all the foregoing and upon consideration of all the evidence of record, proposed findings, briefs and replies of the parties, it is concluded that the application of KSTP, Inc., should be granted and the application of American Broadcasting-Paramount Theatres, Inc., should be denied.

#### ORDER

Accordingly, IT IS ORDERED, This 28th day of May, 1962, that unless an appeal from this Initial Decision is taken to the Commission by any of the parties, or unless the Commission reviews the Initial Decision on its own motion, in accordance with the provisions of Section 1.153 of the Rules, the application of KSTP, Inc. (KOB), Albuquerque, New Mexico, for modification of construction permit, File No. BMP-1738, IS GRANTED and the application of American Broadcasting-Paramount Theatres, Inc. (WABC & Aux.), New York, New York, for renewal of existing license, File No. BR-167, IS DENIED.

/s/ Asher H. Ende  
Hearing Examiner, FCC

Released: May 29, 1962 and effective 50 days thereafter, subject to the provisions of the Rule cited in the ordering clause above. Exceptions, if any, must be filed within 30 days of the release date unless an extension is duly granted.

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[833]

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington 25, D. C.

FCC 63-617  
36704

In re Applications of	)	DOCKET NO. 6584
HUBBARD BROADCASTING INC., (KOB)	)	File No. BMP-1738
Albuquerque, New Mexico	)	
For Modification of Construction Permit	)	DOCKET NO. 14225
AMERICAN BROADCASTING-PARAMOUNT	)	File No. BR-167
THEATRES, INC. (WABC & Aux.)	)	
New York, New York	)	
For Renewal of Existing License	)	

Appearances

Frank U. Fletcher and Edward F. Kenehan on behalf of Hubbard Broadcasting, Inc. (KOB); Vernon L. Wilkinson on behalf of American Broadcasting-Paramount Theatres, Inc.; and Ernest Nash on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

Decision

[35 FCC 36-43]

By the Commission: Commissioners Cox and Loevinger not participating.

1. This proceeding represents another step in the twenty-year search for an accommodation of the conflicting operations of Stations KOB and WABC on the clear channel frequency 770 kc. Principally involved here is the question of whether the result of our 1958 Decision herein <sup>1/</sup> -- that each station be permitted to utilize 50 kw of power nighttime, with directionalization so as to protect the other to certain stated limits -- will adversely affect the competitive position of the ABC radio network and, if so, whether such fact would require the alteration of the above result. Before the Commission are the applications of Hubbard Broadcasting, Inc. (formerly KSTP, Inc.) for mod-

ification of the KOB construction permit to specify operation on 770 kc in conformity with the parameters specified in the 1958 Decision, and the application of American Broadcasting-Paramount Theatres, Inc., for renewal of the WABC license, which includes non-directional nighttime operation. As is apparent from the foregoing, the case concerns nighttime service only.

2. In an Initial Decision released May 29, 1962 (FCC 62D-44), Hearing Examiner Asher H. Ende proposes to grant the application of Hubbard and to deny that of ABC. Exceptions were timely filed by all parties hereto, and oral argument was held before the Commission en banc on November 19, 1962. The Commission's rulings on the exceptions are contained in the appendix hereto. The Commission has reviewed the Initial Decision in light of the record and the exceptions, and is in substantial agreement with the Examiner.

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<sup>1/</sup> Albuquerque Broadcasting Company, 25 FCC 683, 16 RR 765.

Accordingly, except as modified herein or in the appendix hereto, the Initial Decision is adopted. Additionally, we have set forth, infra, our conclusions supplementing those of the Examiner.<sup>2/</sup> In order to place our conclusions in context, we shall briefly review the more pertinent facts.

3. The background of this proceeding is set forth in the Initial Decision and in Appendix A to the 1958 Decision, and need not be repeated. Particularly pertinent here are the facts that the Commission, by its 1958 Decision herein, has determined that the mandate of Section 307(b) of the Act would be met through allowing both KOB and WABC to operate on 770 kc, directionalizing nighttime to protect each other, and has, in the Clear Channel proceeding, concluded that WCBS (licensed to Columbia Broadcasting System, Inc.) and WNBC (licensed to National Broadcasting Company) may continue to operate non-direction-

ally at night on the frequencies 880 kc and 660 kc.<sup>3/</sup> WABC as presently operating serves substantially the same areas and populations with primary and secondary service as do WNBC and WCBS, but directionalization in accordance with our 1958 Decision would deprive 702,326 persons of its primary service and 17,213,848 persons of its secondary service.<sup>4/</sup>

4. At the time of the hearing herein, the ABC radio network had 397 affiliates, more than either the CBS or NBC radio networks, and had a greater number of affiliates in the so-called "top 200 markets" than any other network. ABC claims inferiority in the number of full-time and clear channel affiliates, but a conclusion as to overall inferiority in the matter of affiliations lacks record support, ABC having failed to submit comparative figures on the number of full-time and clear channel affiliates and the populations served thereby. ABC claims network coverage of 95% of American homes, compared to 96.8% and 97.6% claimed by CBS and NBC, respectively. The number of ABC network affiliates has been increasing, and such affiliates are clearing more programming for the network than in the recent past.

5. Three ABC affiliates provide nighttime primary service to small portions of the area in which WABC's primary service will be curtailed by directionalization: WFIL, Philadelphia, Pennsylvania; WEEU, Reading, Pennsylvania; and WILM, Wilmington, Delaware. No showing was made as to the rural populations served by such stations, but the limited nighttime coverage of each indicates that the vast majority of those losing WABC's

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ABC excepts (exceptions 8 and 23) to the form of the Initial Decision, and what it describes as the "co-mingling of basic facts, ultimate facts, and conclusions . . . followed by a one paragraph conclusion". The Examiner's procedure appears to have been generally warranted in view of the widely divergent views as to the relevancy and materiality of ABC's evidence, and the scope of the hearing issues.

3/

WNBC shares the frequency 660 kc at night with a full-time station in Alaska. Under the rule amendments adopted in the Clear Channel

proceeding WCBS will share the frequency 880 kc with an unlimited - time Class II-A station in North Dakota, South Dakota, or Nebraska, but will be protected against nighttime co-channel interference to the 0.5-mv/m, 50-percent skywave contour.

4/ These population figures are based upon the 1960 Census, and are somewhat larger than those shown for the same areas in the 1958 Decision, but would not affect the determination there made that the service of KOB to be gained outweighs that of WABC to be lost.

primary service do not have available ABC network programming through any other primary service. With respect to the area in which WABC's secondary service will be lost, relatively few of the 17,200,000 persons affected thereby receive primary service from other ABC network affiliates. However, 99% of that area receives secondary service from ABC-owned WLS, Chicago, and 65% receives such service from ABC-affiliate KXEL, Waterloo, Iowa. 5,667,808 persons in the WABC secondary loss area receive no primary service, and are thus wholly dependent upon secondary skywave signals for nighttime radio service.

6. From the standpoint of availability of multiple sources of network programming, CBS and NBC presently enjoy a competitive advantage over ABC in both the WABC primary and secondary service loss areas. Thus CBS network affiliates provide a minimum of five and a maximum of nine secondary services to the WABC secondary loss area, and NBC network affiliates furnish from three to ten such services to that area. Similarly, a majority of the WABC primary service loss area receives primary service from one or more NBC and CBS affiliates exclusive of WNBC and WCBS.

7. ABC presented evidence of selected network news and public affairs programs, but did not make a complete showing as to its present network programming.<sup>5/</sup> Conceding the worthiness of such programming, detailed findings thereon are unnecessary, ABC having neither claimed nor demonstrated that such programming would be affected by the required directionalization of WABC, or that, if it were to be so



affected, the ability of ABC to compete as a network would be impaired.

8. Testimony that the ABC radio network was operating "in the red" was properly excluded by the Examiner as an unsupported conclusion. Factual evidence concerning the ABC network's financial position was not offered. No direct evidence was offered on the question of how present and prospective time-buyers would act in the future with respect to the ABC network if WABC were required to directionalize, although the network's vice-president for sales testified as to some isolated instances of problems encountered in the acquisition of sponsors. Such problems include obtaining clearance from affiliates to carry particular programs, as well as ABC's existing comparative inferiority in nighttime coverage.

5/ WABC Exhibit 104, entitled "Programs and Activities Broadcast in the Public Interest by WABC Radio since January 1960", was properly excluded by the Examiner. Evidence of WABC and ABC network programming is considered admissible only to the extent that it bears upon the question of competitive impact, i.e., that the network will lose its ability to present certain programming through loss of technical facilities or adequate revenues, and will thereby be deprived of its appeal to listeners and affiliates, with resultant diminution of its competitive position. That persons in the WABC primary and secondary loss areas will be deprived of worthy WABC programs (whether network or not) was assumed by the Commission in its Section 307(b) determination in the 1958 Decision.

#### Conclusions

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9. The Commission has been mindful of the effect upon network competition which its actions in rule-making and licensing proceedings may have. In the allocation of television channels the Commission has sought to provide major cities with a sufficient number of competitive channels to accord the public a greater choice of programming, including the programming originated by the three major networks. Moreover, ABC owes its very existence to the Commission's determination, in its Report on Chain Broadcasting in Docket No. 5060, that

furtherance of competition among the networks would be better served through the divestment by RCA of one of its two radio networks; see Radio Corporation of America, 10 FCC 212 (1943). At the time of its creation in 1943, ABC owned three standard broadcast stations, including what is now WABC and was affiliated with 163 others. KOB was at that time already occupying the frequency 770 kc pursuant to a modification on October 14, 1941, of its Special Service Authorization.

10. The Commission gave specific consideration to ABC's competitive position vis-a-vis other networks in the ABC-Paramount Merger Case, 8 RR 541 (1953). Particularly noted there (paragraphs 100 and 101) was ABC's difficulty in providing "the full amount of competition expected to flow from [its] establishment . . . as an independent, competitive network", and "[i]n obtaining clear channel skywave affiliates, important for national coverage." It was found that as of December, 1951, ABC had a total of 298 AM affiliates, including six clear channel stations, and that NBC and CBS owned or were affiliated with 23 and 20 clear channel stations, respectively.

11. The continued improvement of ABC's competitive position vis-a-vis NBC and CBS is demonstrated by the fact that at the time of the hearing herein it had 397 affiliates, more than either NBC or CBS, and had more affiliates in the top 200 markets than any other network. Conceding that ABC continues to trail the other networks in clear channel and full-time affiliations, ABC has not claimed, much less demonstrated, that it has been precluded from obtaining such affiliations through an inferior competitive position.<sup>6/</sup> Moreover, ABC points to a continuing improvement in number and quality of its affiliates.<sup>7/</sup> It should not be overlooked that the question of whether a particular station will affiliate with a given network is one to be decided by the parties concerned, and lies largely outside the regulatory scheme of the Commission, notwithstanding that the Commission

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<sup>6/</sup> Since the record herein was closed, ABC has acquired affiliation

with four additional clear channel stations, two of which (WHAM, Rochester, New York; WWVA, Wheeling, West Virginia) serve portions of WABC's secondary service loss area. (Officially noticed.)

7/ ABC appears now to be well over 400 in the matter of affiliated stations, recent additions including WRUN, Utica-Rome, New York; KARM, Fresno, California; WBBX, Portsmouth, New Hampshire; WTAL, Tallahassee, Florida; WOKK, Meridian, Mississippi; KASE, Austin, Texas; WMOU, Berlin, New Hampshire; WABJ, Adrian, Michigan; KNGL, Paradise-Chico, California; and WHBB, Selma, Alabama. Most of the foregoing are full-time stations, KARM operating with 5kw of power at night. (Officially noticed.)

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[837]

has laid down certain ground rules pertaining to the conditions of such affiliations. Thus, the extent to which a network is able to acquire affiliates is dependent upon the programming service it offers and the compensation which it is able to pay the affiliating station, as well as the judgment and abilities of the network's principals. ABC's greater number of affiliates and its claimed superior "inside coverage" may well indicate a judgment by it that such coverage is more readily salable to advertisers than the less reliable secondary coverage.

12. It was recognized, in the Commission's 1958 Decision herein, that Station WABC would suffer a significant loss of secondary and primary service through directionalizing its nighttime operation to protect that of KOB. However, it was concluded there that the gain of KOB's primary and secondary service to be realized in unserved and underserved areas would more than offset the losses of WABC in terms of the overall public interest, and that the requirements for a fair, efficient, and equitable distribution of radio service would be better met through such operation. The Court sustained this determination, and the only question before us now is whether the effect of WABC's losses upon the network's competitive position are such as to require a different result.

13. The record before us presents a virtual void on this question. ABC seeks to negate its failure to meet its burden of proof by claiming

to fall within the test stated by the Examiner: ". . . if a network demonstrates that it, as a network, has, in fact, been deprived of a service area and audience equal to approximately 10 percent of that available in the entire country, it may well have made a prima facie showing of prejudice and adverse effect vis-a-vis its competitors who are not similarly deprived." (Initial Decision, paragraph 38.) While the test stated by the Examiner may have validity, it is clear that ABC does not fall within the stated 10% test, since the 17,000,000 persons living in the WABC secondary loss area are not losing their only ABC programming source. 99% will continue to have available the secondary service signal of WLS, and 65%, that of KXEL. Moreover, no showing has been made that ABC cannot secure affiliations with other stations which would serve this area. It is also of significance that ABC failed to show any adverse effect upon its network programming or sales, or in its capacity to compete with others. Nor did it make any showing of the effects of WABC's losses upon its ability as a network to keep and acquire affiliations with other stations.

14. However, it is ABC's basic thesis that the Commission's action in the Clear Channel proceeding -- where the existing non-directional operations of both WCBS and WNBC are to be protected -- requires the conclusion that ABC is not being provided facilities in New York which are fair and equitable in comparison with the other networks. ABC points out that at the time of the adoption of the 1958 Decision herein, the Commission had proposed in the Clear Channel proceeding to open a number of frequencies, including those occupied by WCBS and WNBC, to Class I assignments in the west and to require the existing operations thereon to directionalize. Further study, however, resulted in the Commission concluding, in its Third Notice therein (September 22, 1959), that such wholesale directionalization:

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[838]

"would result in substantial reduction of the existing ground wave and skywave service, with the result that substantial new 'white areas' would be created in which no ground wave service would remain available from any station and that other areas would be reduced in the number of services received from four, three or two ground wave services to a single ground wave service. In addition, substantial dislocations would obtain of present skywave service which would not be fully compensated by new operations."

In its Report and Order in the Clear Channel proceeding (31 FCC 565, 21 RR 1801), which will require 13 Class I stations to share their frequencies at night, the Commission, after quoting the above language, stated:

"the requirement of directionalization by the Class I stations has been eliminated and the undesirable results noted would not occur<sup>4/</sup>

<sup>4/</sup> That we do not follow the Further Notice approach generally does not alter the validity of our conclusion that in the case of one particular I-A channel -- 770 kc -- directionalization of the existing Class I station so as to afford mutual protection to a similar operation in New Mexico would best serve the public interest. . . ."

15. It may be conceded that the Commission's requirement that WABC directionalize nighttime while WCBS and WNBC are permitted to operate nondirectionally would leave ABC with a facility in New York inferior, from the standpoint of coverage, to those of NBC and CBS. ABC, however, has failed to translate the comparatively inferior coverage of WABC into a competitive inferior of the ABC radio network vis-a-vis NBC and CBS. It appears to assert that the different treatment accorded its channel is per se prejudicial, and that some other channel should be used to accommodate the requirements of primary and secondary service to underserved populations in the Albuquerque area. This argument might be made with like force by the licensee of



any other clear channel so selected. The mere fact that the frequency 770 kc has been treated differently from other clear channels does not establish such action as arbitrary and prejudicial. Compelling public interest reasons, explained at length in the 1958 Decision herein, justify the separate consideration of this channel and the somewhat different disposition of it. Even assuming that some greater showing of prejudice to the ABC network could be made, despite the failure to make such a showing in this record, we believe that these public interest considerations are paramount. The requirement of directionalized operation by both KOB and WABC will achieve a more suitable distribution of radio service. There are means other than the basic frequency allocation structure for achieving a more fully competitive distribution of network stations and affiliates, if ABC should find that necessary.

16. In summary, it is the Commission's view that ABC has not shown that it, as a network, would be prejudiced by the requirement that WABC directionalize nighttime. ABC has not demonstrated that competition among the radio networks would be substantially lessened by the

requirement that WABC directionalize nighttime. Thus, ABC has failed to show why the Section 307(b) determination reached in the Commission's 1958 Decision should not be controlling, and accordingly it is concluded that the public interest would be served by a grant of the application of Hubbard Broadcasting, Inc., for operation of Station KOB in Albuquerque in accordance with the parameters specified in that Decision and by denial of WABC's application for renewal of its existing non-directionalized operation.

17. In its Order designating these applications for hearing, the Commission declined to consolidate the application of KSTP, Inc. (now Hubbard Broadcasting, Inc.), for operation in New York on 770 kc in

accordance with the requirements of the 1958 Decision, but recognized its right to a hearing with ABC if the latter were to prevail in the instant proceeding. The Commission also observed that, notwithstanding a denial of WABC's renewal application, the Commission might, in its discretion, "afford WABC a final opportunity to file an application for authority to make changes in the operation of Station WABC in the manner specified in Paragraph 22 of our September, 1958, Decision in this proceeding." The evidence herein, while falling far short of that which would require alteration of the Commission's 1958 Decision, does persuade the Commission that ABC should not be deprived of its New York outlet without an opportunity for a hearing on the comparative merit of any application filed by it for directionalized operation, divorced from the 307(b) considerations of the instant proceeding. Therefore, ABC will be afforded a final opportunity to seek a permit to conform its operation to the parameters specified in the 1958 Decision and to obtain comparative consideration with the application of Hubbard Broadcasting, Inc. for directionalized operation on 77 kc in New York.

ACCORDINGLY, IT IS ORDERED, This 3rd day of July, 1963, That the application of Hubbard Broadcasting, Inc., for modification of construction permit of Station KOB, Albuquerque, New Mexico, IS GRANTED: and that the application of American Broadcasting-Paramount Theatres, Inc., for renewal of license of station WABC, New York, New York, IS DENIED, without prejudice to reconsideration if ABC files, within 30 days of the release date hereof, an application for modification of facilities on the frequency 770 kc in conformity with the parameters specified in paragraph 22 of the September, 1958 Decision herein (25 FCC 683, 16 RR 765).

FEDERAL COMMUNICATIONS COM-  
MISSION

/s/ Ben F. Waple  
Secretary

Attachment  
Released: July 8, 1963  
[SEAL]

APPENDIX

Rulings on Exceptions to the Initial Decision

Exceptions of American Broadcasting-Paramount Theatres, Inc.

<u>Exception No.</u>	<u>Ruling</u>
1-3, 12, 20, 21, 27, 28, 30, 67	<u>Denied</u> , as cumulative in part and irrelevant in the remainder.
4	<u>Granted</u> , and footnote 14 of the Initial Decision is deleted.
5, 6, 18, 19, 32	<u>Denied</u> as irrelevant.
7, 26	<u>Granted</u> to the extent reflected in paragraph 14 of the Decision.
8, 23, 25	<u>Denied</u> for the reasons stated in footnote 2 of the Decision.
9-11, 13, 65, 66	<u>Denied</u> . Though not relevant to our decision, the Examiner correctly described the nature of this proceeding.
14	<u>Denied</u> , as directed to a non-existent proposition.
15, 31	<u>Denied</u> . The Examiner's exclusion of evidence directed to the already-settled 307(b) question was required by the Commission's order designating the proceeding for hearing.
16	<u>Denied</u> for the reasons stated in footnote 5 of the Decision.
17, 36	<u>Denied</u> for the reasons stated in paragraph 8 of the Decision.
22	<u>Denied</u> . The finding excepted to contains no such implication.
24, 29, 38, 40, 46-48	<u>Granted</u> to the extent reflected in paragraph 5 of the Decision. Paragraphs 45 and 46 of the Initial Decision are deleted.
33, 34	<u>Denied</u> . The Examiner's findings adequately reflect the record.
35	<u>Denied</u> as irrelevant to the subject matter of the finding to which exception is taken.

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[841]

<u>Exception No.</u>	<u>Ruling</u>
37	<u>Denied</u> as unsupported conclusions.
39, 42, 43	<u>Denied</u> . The Examiner's recitation in paragraph 40 properly depicts the failure of proof by ABC of the nature and extent of network programming affected by the requirement that WABC directionalize nighttime.
41, 44, 45	<u>Granted</u> to the extent that the Commission deems relatively insignificant the extent to which ABC affiliates serving minor portions of the WABC primary and secondary loss areas carry network programming, or are listened to in preference to WABC.
49	<u>Granted</u> to the extent reflected in paragraph 6 of the Decision.
50-64	<u>Granted</u> to the extent that paragraphs 49-51, 53, 54, and 56-58 of the Initial Decision are deleted.
68-70	<u>Denied</u> . The Commission does not discern the "implication" to which the exceptions are directed.
71-75	<u>Granted</u> to the extent that paragraphs 69-75 of the Initial Decision are deleted, and denied in the remainder for the reasons stated in the Decision.

Exceptions of Hubbard Broadcasting, Inc.

1	<u>Granted</u> to the extent that the matter excepted to has been deleted; see ruling on ABC exceptions 71-75.
2, 3	<u>Granted</u> to the extent reflected in the Decision.

Exceptions of the Commission's Broadcast Bureau

1	<u>Granted</u> , and footnote 21 of the Initial Decision is deleted.
2	<u>Granted</u> , and footnote 35 of the Initial Decision is enlarged by adding at the end thereof the following: "However, this frequency is employed unlimited time by Station KFAR, Fairbanks, Alaska."
3	<u>Denied</u> as lacking decisional significance.
4	<u>Granted</u> . See ruling on ABC exceptions 46-48.
5	<u>Denied</u> as immaterial, the finding excepted to having been deleted; see ruling on ABC's exceptions 50-64.

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[Rec'd. April 2, 1962 - FCC]

BROADCAST BUREAU REPLY TO "PROPOSED  
FINDINGS OF FACT AND CONCLUSIONS OF LAW  
OF AMERICAN BROADCASTING-PARAMOUNT  
THEATRES, INC."

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1. Some comment with respect to the Proposed Findings and Conclusions filed by American Broadcasting-Paramount Theatres, Inc. ("ABC") on March 19, 1962, is appropriate. ABC has apparently forgotten that in its order designating the additional hearing in this proceeding, the Commission made it clear that its only purpose was to consider:

"... any additional evidence to be presented by WABC with respect to its network position on the frequency 770 kilocycles and to determine in the light of such evidence whether the issue is such that it overrides the 307(b) determination previously rendered by the Commission in its decision of September 3, 1958."  
(Order released August 4, 1961; Mimeo FCC 61-981.)

2. ABC needs to be reminded that the Commission in its decision of September 3, 1958 (25 FCC 683) fully considered the extent of the loss of secondary service which would accrue to Station WABC if it were to directionalize. Also fully considered in that same decision were the consequent effects upon the public of the implementation of that determination.

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ABC needs also to be reminded that the Court of Appeals fully sustained the Commission's findings and conclusions in these respects, leaving open only the question of possible adverse affect upon the ABC network-an issue raised by ABC.

3. In its proposed findings in this proceeding ABC has sought to obfuscate the undeniable fact that the argument that its network position



would be adversely affected if the Commission's decision of September 3, 1958, were to be implemented is not supported by any valid evidence in the record of this proceeding. ABC's long and detailed exposition of the history of this proceeding, whatever the accuracy of the ABC version, is already well documented in the records of the Federal Communications Commission and the Court of Appeals. It was not the purpose of this proceeding to retrace that well worn path. It was the purpose of this proceeding - the only purpose as the Commission made it so clear - to give ABC the opportunity to support with evidence its argument that requiring WABC to directionalize would have an adverse effect upon the ABC network. This ABC clearly has not done. ABC's proposed findings, as does the entire evidentiary record in this hearing, stand as eloquent testimony to the one undeniable fact that it cannot be demonstrated that any cognizable adverse effect will accrue to the ABC network if Station WABC were to directionalize.

4. A few examples will suffice. ABC asks that the Examiner find on the testimony of its programming Vice President that the ABC network is operating at a loss. This testimony, clearly incompetent,

[631]

was stricken from the record by the Examiner (Tr. 346). Counsel for ABC asked for and was given an opportunity to produce competent evidence as to the network's financial position (Tr. 283). He decided not to do so (Tr. 330). ABC seeks findings as to the importance of secondary coverage to network time sales. ABC disregards the testimony of its sales Vice President that as a time salesman he was not even conversant with secondary coverage. He was briefed on the subject for his appearance in this proceeding (Tr. 318). ABC seeks findings to the effect that its network has a weakness due to the lack of extensive secondary coverage. It ignores the testimony of its own witness and its own literature showing that the ABC network excels in primary coverage and that secondary coverage is of no benefit to advertisers (KSTP Exs. 1 and 2). The testimony of ABC's witnesses in this regard

was wholly speculation and hearsay as to what others might think or say (Tr. 297-300).

5. ABC sought throughout the hearing to substitute argument for evidence. It has carried this process into its proposed findings. All that ABC has proved is that its argument regarding adverse effect upon its network position is wholly without evidentiary foundation. This contention, wholly lacking in evidentiary support, should not and cannot be permitted to delay any longer implementation of the determination reached by the Commission almost four years ago. The findings and conclusions proposed by ABC are either irrelevant to this proceeding or

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wholly without foundation in the record. The Examiner should adopt the findings and conclusions proposed by the Broadcast Bureau. Public interest and orderly process require that implementation of the Commission's decision of September 3, 1958, be accomplished without further delay.

Respectfully submitted,  
Kenneth A. Cox  
Chief, Broadcast Bureau

by /s/ Thomas B. Fitzpatrick  
Acting Chief, Hearing Division

/s/ Ernest Nash  
Attorney  
Federal Communications Commission

April 2, 1962

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Excerpts from ABC's Exceptions to the Examiner's Initial Decision and  
Request for Oral Argument, Received July 12, 1963

\* \* \* \* \*

[703]

Exception No. 22

Fdg. 30. To any implication, from the Examiner's seriatim treatment of the matters therein discussed ("Furthermore. . . Finally"), that evidence of private monetary losses resulting from the action complained of, though fully established in the instant case, is a sine qua non to a showing that the action complained of would contravene the public interest.<sup>1/</sup>

<sup>1/</sup> By way of illustration: If the record showed that the action in question would deprive some 100 million persons east of the Mississippi of their only means of obtaining a useful program service provided by the ABC radio network, a conclusion that the public interest would be adversely affected thereby  
(continued on next page)

\* \* \* \* \*

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(continued from preceding page)  
with the Commission on record that competitive network radio services are in the public interest) would certainly be warranted, notwithstanding a rebuttal showing that ABC might actually profit in dollars and cents if, as a result of such action, ABC elected to discontinue its radio network operations and to convert its flagship station into a rock-and-roll operation catering exclusively to the New York metropolitan area. By way of further illustration: If ABC operated a non-commercial educational network and the issue (as here) was whether it would be "fair and equitable" to allow other educational and commercial networks to double their power while ABC was ordered to cut its power in half, a conclusion that such action was unfair and inequitable and contrary to the public interest could be made even though the educational network in question was operated on a noncommercial basis. See Judge (later Justice) Rutledge's opinion in National Broadcasting Company v. Federal Communications Commission, 76 U.S. App. D.C. 238, 240-242 (1942), affirmed 319 U.S. 239 (1943).

\* \* \* \* \*

\* \* \* \* \*

Exception No. 31

Fdgs. 32-75. To the Examiner's failure to make the following requested findings, fully supported by proffered evidence, showing that the substantial losses in the East would not be outweighed by the minimal gains in the West: <sup>1/</sup>

1/ To avoid considering in a vacuum the substantial losses which ABC and the public would suffer east of the Mississippi if WABC were required to directionalize and so that such losses could be weighed against any gains accruing to KOB and the public west of the Mississippi, ABC proffered updated data (likewise based on 1960 figures) contrasting KOB's coverage as a Class I and as a Class II-A station on 770 kc -- with the latter operation (like those of the other 12 Class II-A's in Docket 6741) protecting WABC's present 0.5 mv/m 50% sky-wave contour. Such data was rejected as not within the scope of Issue 2 as presently phrased (T. 79-82). As elsewhere, because predicated on excluded data, the findings here sought are bracketed, with a request that the Commission reconsider the Examiner's exclusionary ruling.

[731]

[(a) KOB's nighttime coverage (a) if both KOB and WABC were to operate as Class I stations on 770 kc, with 50 kw power, using the parameters set out in paragraph 22 of the September 3, 1958 decision, and (b) its coverage if KOB were to operate as a Class II-A station with 50 kw power on 770 kc, protecting the dominant station (as the Class II-A stations on the other 12 channels "broken down" in Docket 6741 are required to do) are tabulated below (WABC Ex. 101, pp. 31-34; WABC Ex. 102):

1213

	<u>Primary</u>		<u>White Area</u>	
	<u>Population</u>	<u>Area</u>	<u>Population</u>	<u>Area</u>
KOB (Class I)	525,694	72,330	122,270	66,962
KOB (Class II-A)	355,633	26,890	54,836	22,890
	170,061	45,440	67,434	44,072
	<u>Secondary</u>		<u>White Area</u>	
	<u>Population</u>	<u>Area</u>	<u>Population</u>	<u>Area</u>
KOB (Class I)	3,371,676	744,000	1,253,605	505,798

[(b) The 170,061 persons to whom KOB would provide a nighttime primary service (including the 67,434 to whom it would provide a first primary service at night), in the event KOB were to operate on 770 kc as a Class I rather than as a Class II-A station (with WABC direction-  
alizing), receive secondary service from 8 to 11 other stations, 8 of which (KOA, KVOO, WHO, KFI, WOAI, WFAA/WBAP, KNBC, KFAB) are affiliated with the same network as KOB (NBC) (WABC Ex. 102, pp. 5-9).

[732]

[(c) The 3,371,676 persons to whom KOB would provide an additional secondary service (including the 1,253,605 who, like the 5,667,858 in the WABC differential area, have no primary service at night), presently receive from 2-11, and except for a small area in Montana or Idaho, 4-11 other skywave signals. Substantial portions of the area to which KOB, an affiliate of NBC, would provide a secondary nighttime service presently receive skywave signals from other NBC owned or affiliated stations (KFAB, KFI, KNBC, KOA, KSTP, KVOO, WFAA/WBAP, WHO, and WOAI) (WABC Ex. 102, pp. 5-10).



[(d) The small areas (in Montana and Idaho) presently restricted to two and to three skywave services receive such service from KSL and KOA, and from KSL, KOA, and KNBC or KSTP, the underscored stations being associated with the same network as KOB and with KSTP (like KOB) licensed to KSTP, Inc. (WABC Ex. 102, pp. 4, 10). The portion of this secondary service area in which only two secondary services are presently received, one being from another NBC affiliate, has a population (in 1950) of 10,252 persons and an area of 7,100 squares, and the adjacent area which receives only three skywave services, two being from NBC affiliates, is roughly the same size (25 FCC 683, 698, para. 24; WABC Ex. 102, pp. 4, 10). In short, the number of persons (some of whom live within 40 miles of New York City) presently

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receiving a primary service from WABC but who would hereafter be dependent on the skywave signal of a single station (WLS) for the programs of the ABC radio network, is some 30 times that of those small portions of Montana and Idaho, now limited to 2 or 3 skywave services, and who could gain a second or a third NBC signal if KOB were to operate as a Class I rather than as a Class II-A facility.]

\* \* \* \* \*

[Rec'd July 12, 1962]

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington 25, D. C.

In re Applications of  
KSTP, INC. (KOB)  
Albuquerque, New Mexico

For Modification of  
Construction Permit

AMERICAN BROADCASTING-  
PARAMOUNT THEATRES, INC.  
(WABC & Aux.)

New York, New York

For Renewal of Existing  
License

Docket No. 6584  
File No. BMP-1738

Docket No. 14225  
File No. BR-167

BRIEF BY ABC IN SUPPORT OF

ITS EXCEPTIONS

AMERICAN BROADCASTING-  
PARAMOUNT THEATRES, INC.

By Mortimer Weinbach  
7 West 66th Street  
New York 23, New York

James A. McKenna, Jr.  
Vernon L. Wilkinson  
McKenna & Wilkinson  
1735 DeSales Street, N.W.  
Washington 6, D. C.

July 12, 1962

Its Attorneys

[ Rec'd July 12, 1962]

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**BRIEF BY ABC IN SUPPORT OF  
ITS EXCEPTIONS<sup>1/</sup>**

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**I.**

**Concessions by the Examiner**

Before ABC undertakes to brief, with some effort at coherency, the various exceptions which it has interposed

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<sup>1/</sup> Because of the principle that matters not objected to are deemed waived, ABC has felt constrained to object to several aspects of the Initial Decision, even though such exceptions relate to matters which are not thought to be determinative of the end result (e.g., Exceptions 1-6, 8). In order to present a coherent brief of manageable length, on points deemed controlling, an effort has been made by ABC to state its exceptions on ancillary and subsidiary matters in language which is self-explanatory, while at the same time observing the Commission's admonitions against argumentative exceptions (see Exceptions 21, 33-34, 36, 43, 49-51, 65-67, 69-71, 73). In a few instances, where the reasons for such exceptions might otherwise be unclear, further explanatory material has been added via footnotes (see Exceptions 17, 20, 22-23, 25). If the Commission is of the view that such footnoted material contravenes Rule 1.154, it is requested that the footnotes to those particular exceptions be ignored.

[ 758]

to the Examiner's Initial Decision, it desires to highlight, because of their significance, a number of findings, observations, and concessions made by the Examiner in his Initial Decision.

The Examiner recognizes that the Commission, as a concomitant part of its 1958 decision in Docket 6584, amended its rules so as to permit two Class I operations on 770 kc, with the record in Docket 6584 "to remain open for the purpose of considering further adjudicatory matters" -- action which rendered the 1958 decision interlocutory and not subject to review at that juncture under Section 402(b) of the

Communications Act (Fdg. 2). He further notes that the Court, in reviewing rule-making action which would permit two Class I operations on 770 kc, concluded in 1960 that ABC should not be required to share a clear channel (as ordered by the Commission in 1958) if other networks were subsequently accorded full use of their channels in the then undecided Clear Channel Proceeding (Fdg. 24; cf. Fdg. 4). He admits that, principally because of this caveat by the Court, the Commission in its July 1961 order "reopened the record in Docket No. 6584" for the purpose of permitting ABC to adduce certain data and for the purpose of determining whether such matters should "override" the 1958 determination (Fdgs. 7 and 9).

[ 759]

The examiner concedes that the further hearing thus ordered by the Commission in July 1961 raises two basic questions: First, whether ABC in 1958 was accorded, on a fair and equitable basis, network facilities comparable to those accorded NBC and CBS in 1961, and if not, whether "such unfairness or inequity is sufficient to outweigh the public interest considerations which led the Commission in its September 1958 decision" to permit KOB to operate as a Class I station on 770 kc (Fdg. 28) -- matters which he admits were not passed on by the Commission in 1958, with the record at that time limited (over ABC's objections) to naked area and population figures (Fdg. 38, fns. 40 and 41).

The Examiner then recognizes that ABC's burden on the foregoing issues could be met in either of two ways: (1) "... by demonstrating a loss to the network of such a large area and/or audience that reasonable men must inevitable conclude its position and ability to serve in the public interest are prejudiced," or (2) "by showing directly that whatever loss is suffered will cause it to lose sponsors for network programs or network advertising to a substantial degree and thereby sufficiently weaken its position as to prevent it from competing as effectively as it does now and, therefore, from providing service in the public interest" (Fdg. 30).

In like fashion, he elsewhere admits, regardless of any showing of losses of revenues or other adverse financial

[ 760]

effects, "if a network demonstrates that it, as a network has, in fact, been deprived of service area and audience equal to approximately 10 percent of that available in the entire country [i.e., approximately 17 million persons], it may well have made a prima facie showing of pre-judice and adverse effect vis-a-vis its competitors who are not similarly deprived" (Fdg. 38). He likewise concedes that neither the Bureau nor KSTP "challenges the accuracy" of ABC's basic underlying engineering data nowhere rebutted in the instant record (Fdgs. 37, 38, cf. Fdg. 58), and he seemingly recognizes that one or two skywave signals cannot be relied upon to provide a satisfactory or dependable program service to areas not receiving an interference-free primary signal from stations carrying those same programs (see Fdgs. 47 and 48).

The Examiner further admits that neither WCBS nor WNBC was required by the 1961 decision in Docket 6741 to directionalize, that no duplication of 660 kc is presently contemplated in the 48 contiguous states of the Union, that the Class II-A station on 880 kc must protect WCBS's present 0.5 mv/m contour, and "that ABC has established it is being treated differently from the way CBS and NBC are being treated insofar as network facilities via their respective owned-and-operated stations in New York are concerned" (Fdg. 36 and fn. 35).

[ 761]

The record further shows, as he admits, "that ABC does not have as many clear channel or full-time affiliates as do CBS and NBC and that it lacks full-time affiliates in many major markets. In addition, many affiliates operate with less power than do those of CBS and NBC. Finally, ABC does not claim to cover as many homes with its network service, its figures being 95 percent of all American homes as against



96.8 and 97.6 percent, respectively, for CBS and NBC. ABC contends that all of these factors place it at a disadvantage even now, in competing with the other networks. It cites several examples of problems it encountered in 'selling' certain programs to sponsors and advertisers, and alleges that the problem of its inferior nighttime coverage is brought up time and time again by national sponsors desirous of maximum coverage. ABC further contends that, because of its lesser coverage it is required to sell news on the ABC network for \$1,000 for five minutes as against \$1,200 on CBS and NBC" (fdg. 33).

## II.

### Misinterpretation by the Examiner of the Basic Underlying Engineering Data<sup>1/</sup>

The Examiner, it would appear, is wholly unaware that the undisputed evidence of record brings this case within

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<sup>1/</sup> See Exceptions 24, 35, 38, 41, 44-48, 54-57, 60, 62, 64, 72-74.

[ 762]

the very concessions that he thus makes -- an unawareness stemming (as we shall see) from the fact that he has egregiously misconstrued the basic underlying engineering data which is nowhere controverted. Fortunately, for ease of refutation, the reasons he went astray are immediately apparent from the Initial Decision itself.

First of all, apparently not realizing that a skywave signal is not deemed to provide a secondary service to cities and urbanized areas "unless the skywave approaches in value the groundwave required for primary service" (Rule 3.182 (i)), <sup>1/</sup> the Examiner construes the 17,213,848 figure, being the number of persons in the secondary differential area to whom WABC presently provides a secondary service and to whom it would cease to provide such a service if it were to directionalize (WABC Ex. 101, p. 11), as constituting the entire population

(urban and rural) of the differential area, rather than merely those who reside in rural portions thereof where a 0.5 mv/m 50% skywave signal is secondary service under the Commission's standards (Rule 3.182(i)).

That the Examiner failed to appreciate that the loss figures of 17, 213, 848, by reason of the Commission's Rules defining "secondary service," was of necessity made up

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<sup>1/</sup> Cf. the Examiner's fn. 39 where he quotes the Commission's definition of "secondary service area" (Rule 3.11(b)) but not its definition of "secondary service" (Rule 3.182(i)).

## [ 763]

entirely of persons residing in the rural portions of the differential area, and did not purport to include another 31, 000, 000 persons residing in cities, urbanized areas, and towns of over 2500 therein <sup>1/</sup> is apparent from his Fdg. 53. There, in purporting to knock down ABC's requested finding that only a small percentage of the 17, 213, 848 people in the differential area (who would lose a secondary service from WABC if it were to directionalize) receive a primary signal at night from any of ABC's 43 affiliates in that area, the Examiner proceeds to total up the population (using 1960 city census figures) of Pittsburgh, Columbus, Indianapolis, Akron, Wilkes-Barre, Erie, Fort Wayne, Augusta, and some 30 other cities, where ABC has affiliates in the differential area, arriving at a figure of 7 3/4 million, and concludes therefrom that at least 8 or 9 million (of the 17, 213, 848 to whom WABC would cease to provide a secondary signal) receive a primary nighttime service from other ABC affiliates licensed to those cities (Fdgs. 53-54).

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<sup>1/</sup> Because not pertinent to the issues, no figures of the total population (urban and rural) residing within the various loss areas were adduced in the instant record -- only the populations which presently receive a primary and secondary service from WABC and which would no longer receive such a service were WABC to directionalize. The total population for the areas in question are being supplied herewith, in the attached

engineering affidavit, solely for the purpose of demonstrating the Examiner's erroneous reasoning on this score.

[ 764]

This is a betise of the worst order. As the Examiner elsewhere notes in this very finding (Fdg. 53), ABC's 43 affiliates which provide nighttime primary service to portions of the differential area include 18 Class IV, 21 Class III, 2 Class II stations, and a single Class I facility. Because of the high nighttime limitations of Class II, III, and IV operations ( see WABC Ex. 105, Appendix C, pp. 1-13), <sup>1/</sup> such stations rarely provide an interference-free primary service at night beyond the urbanized or corporate limits of the large metropolitan areas and cities to which they are licensed, (see WABC Ex. 101, p. 20). <sup>2/</sup> In short, they serve principally urban populations at night, whereas the 17,200,000 figure

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<sup>1/</sup> See the Clear Channel Decision of September 13, 1961 where the Commission notes that little improvement in rural service "may be expected from Class III or IV stations because of unavoidable limitations on their nighttime interference-free service ranges" (31 FCC 565, 569, para. 7).

<sup>2/</sup> And even with respect to the Class I station on this list (WLS), much of the area receiving a primary service at night from that station does not even at present, because of adjacent channel interference with WBBM, receive a skywave service from WABC ( see WABC Ex. 101, p. 20), and to that extent is not therefore included in the 17,200,000 figure -- with the result that this Class I facility (WLS) provides primary service at night to only a small portion of the 17,200,000 persons who would no longer receive a secondary service from WABC.

[ 765]

under discussion consists exclusively of populations residing in rural portions of the differential area. Thus, the Examiner's laborious computation from the census reports of the total population of the 43 cities to which these stations are licensed (some 7-3/4 million) goes for naught, because not a single person of that 7-3/4 million is included in

the WABC 17,200,000 loss figure. Hence, to conclude (as he does) that at least 8 or 9 million (of the 17,200,000 who will lose a secondary service from WABC) presently receive a primary service from ABC's other affiliates in the differential area is a complete non-sequitur (Fdgs. 53-54).

The Examiner commits an identical error in his discussion of the primary area which WABC would lose <sup>1/</sup> -- where WABC would cease to provide a primary service at night to 976,699 persons to whom it presently furnishes such a service (WABC Ex. 101, pp. 25-26). There, in rejecting in his Fdg. 44 a finding sought by ABC that the vast majority of the 976,699 persons thus lost to WABC do not receive a primary service from a ABC affiliate and would hereafter be entirely dependent on the secondary signal of WLS for the program service of the ABC radio network, the Examiner notes that ABC has three affiliates who serve portions of this primary loss area (a Class IV

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<sup>1/</sup> Here again the Examiner quotes the Commission's definition of "primary service area" but not its definition of "primary service" (see Examiner's fn. 36).

station in Wilmington, a Class II station in Reading and a Class III station in Philadelphia). Here again the Examiner totals up the population of these three cities, estimates what portion of the primary loss area these stations cover, and concludes therefrom that most of the 976,699 people to whom WABC would cease to provide a primary signal receive a primary signal from one of these three affiliates (Fdgs.44-45). In doing so he fails to recognize that the 976,699 figure, consisting entirely of persons in rural areas where a signal of 0.5 mv/m (but less than 2.0 mv/m) is sufficient to constitute "primary service" under Rule 3.182 (f) and (g), does not embrace a single person residing in metropolitan or urbanized communities, where interference-free signals of 2.0 mv/m or more are needed to constitute "primary service".

Not realizing that there are in excess of 1,400,000 people in this primary loss area, <sup>1/</sup> and ignoring the fact that a 250-watt Class IV station does not get beyond the Wilmington urbanized area at night, that the Class III operation with a nighttime limitation of 2.97 mv/m (WABC Ex. 105, Appendix C, p.1) has difficulty covering the huge Philadelphia urbanized area at night, and that the Reading Class II operation with a nighttime limitation of 4.94 mv/m (WABC Ex. 103, Appendix C, p. 3) does little

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<sup>1/</sup> See attached engineering affidavit and fn. [1, p. 7], supra.

better (see WABC Ex. 101, p. 27) he proceeds to reject a finding, fully warranted by the record, that the vast majority of the 976,699 persons who would cease to receive a primary service from WABC would hereafter be dependent on a single skywave signal (that of WLS) for the program service of the ABC radio network (WABC Ex. 101, pp. 25-26).

That ABC's exhibits should not have produced any confusion on this score is clear. After delineating WABC's present 0.5 mv/m 50% sky-wave contour and its corresponding contour if it were to directionalize (WABC Ex. 101, Fig. 1, p. 10), ABC's engineer showed, in tabular form, that WABC presently provides "primary groundwave service (0.5 mv/m)" to 17,707,715 people, a "secondary service (0.5 mv/m 50%)" to 24,957,798 people, for a combined "primary and secondary service" total of 42,665,513 persons, followed by corresponding (and greatly reduced) coverage figures in the event WABC were required to directionalize (WABC Ex. 101, p. 11). Similarly, after delineating WABC's present and proposed "0.5 mv/m" nighttime primary contours and depicting the area thus lost by cross-hatching (WABC Ex. 101, Fig. 14, p. 25), ABC's engineer showed in tabular form the number of persons who receive and who would receive, non-directionally and directionally, a "primary groundwave (0.5 mv/m)" service



[ 768]

from WABC (WABC Ex. 101, p. 26). Elsewhere the exhibit showed that all computations were made in accordance with the Commission's rules and standards (WABC Ex. 101, p. 4), and in accordance with stipulated "ground-rules" on which the 1958 decision was based, with the 1960 census figures being substituted for those of 1950 (WABC Ex. 105, p. 8, par IX (a) ). <sup>1/</sup>

Thus, it should have been apparent that the primary and secondary loss figures related solely to population residing in rural areas. If the foregoing figures were not clear to the instant Examiner, it was certainly not the fault of ABC. With its engineering witness on the stand, ABC sought to elicit from him precisely what the exhibits purported to show, only to be confronted with objections and an ultimate ruling that the exhibits were self-explanatory and spoke for themselves (T. 52, 54, 55, 57-58).

The Examiner's next error, in his treatment of unchallenged engineering evidence, is of a somewhat different order, namely, his conclusion that ABC has failed to show, though the figure is undisputed, that 5,667,808 persons "or any number approaching that," of those residing

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<sup>1/</sup> There it was explicitly provided that "urban and urbanized areas," as set forth in the Census reports, were to be excluded in computing populations receiving a skywave service (WABC Ex. 105, p. 8).

[ 769]

in the secondary differential area, are presently without a primary service at night (i.e., "white area" population), and thus dependent on sky-wave signals for a radio service of any kind (Fdg. 57; cf. Fdg. 73). Though aware that the figure was uncontradicted (Fdg. 58), the Examiner registers surprise that "four years later" it should be 20% higher than

the figure contained in the 1958 decision, apparently not realizing that the 1958 decision was predicated on the 1950 census, whereas the instant record is based on the 1960 census, ten years (not four years) later. Although the very Census reports which he cites (Fdg. 57) show that the rural population in 8 of the 13 states, which make up portions of the white area (WABC Ex. 101, pp. 14-15), has increased during the last decade, and apparently unaware (with population growth and ever-augmented RSS limitations) that the "white area" population of the United States is on the increase (from roughly 20 million when Docket 6741 was begun to 25 million when it was terminated) <sup>1/</sup>, he concludes that the white area figure, though unchallenged by either the Bureau or by KSTP, must of necessity be lower than it was in 1958.

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<sup>1/</sup> See the Commission's Clear Channel Decision of September 13, 1961 (31 FCC 565, 568, 571, paras. 6 and 13).

[ 770 ]

The Examiner then embarks on a calculation of his own. On the basis of the generalization that half the land area of the United States is "white area", that the total "white area" population is 25 million, and that the white area portion of the differential area represents 7.5% of the "white area" of the United States, <sup>1/</sup> he concludes (by assuming that those 25 million are uniformly distributed throughout the United States), that there are thus approximately 1,875,000 people, rather than three times that number, in the differential area who are without a primary service at night (Fdg. 57, fn. 61; cf. Fdg. 73). For the Examiner to assume that the rural population density in the East is the same as that of the Rocky Mountain and desert areas of the West borders on the ridiculous. If such an approach were to be used, the Examiner might at least have refined his calculation

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<sup>1/</sup> Why the Examiner elects to thus accept the area computations

made by ABC's engineer, but not his attendant population counts, is nowhere explained. Although a lawyer may choose to ignore aspersions on his own legal acumen, inherent in the Examiner's dissertation on how this case should have been tried (Fdgs. 26, 35, 39, 41, 42, 59, 72 73), a dissertation which stems in large part from the Examiner's misconstruction of basic engineering data in fact adduced, he is duty bound to take strong exception to an Examiner's rejection of unchallenged engineering data, action which would seem to reflect on the competency of a highly respected engineer whose qualifications were conceded by all parties in the instant proceeding, including the Commission's Broadcast Bureau.

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by recognizing that roughly 3/4 of the white area population of the United States (18 out of 25 million) reside east of the Mississippi, in a region which comprises less than one-third of the land area of the United States.

The foregoing misinterpretation by the Examiner of the basic underlying engineering data permeates and undermines his entire Initial Decision. Instead of finding, as the undisputed evidence requires, that only a small percentage of the 17, 200, 000 persons in the rural portions of the "differential area" receive a primary nighttime service from ABC's 43 affiliates whose interference free service areas at night are largely confined to the cities and metropolitan areas to which they are licensed (see WABC Ex. 105, Appendix C. pp. 1-13), and that the vast majority of the 17, 200, 000 (in fact almost 16 million) <sup>1/</sup> would therefore be dependent on intermittent, fading, and fluctuating signals of 0-2 skywave signals for the program service of the ABC network, he erroneously concludes that at least half of the 17, 200, 000 who would thus lose a sky-wave service from WABC receive the programs of the ABC network via primary signals provided by ABC's 43 affiliates (Fdgs. 53-54; cf. Fdg. 73).

Similarly, instead of finding that substantially all (in fact almost 900,000) of the 976,000 persons who would

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<sup>1/</sup> See attached engineering affidavit.

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cease to receive a primary service from WABC would hereafter be dependent on the skywave signal of WLS for the program service of the ABC radio network, he erroneously concludes (contrary to fact) that the vast majority thereof would continue to receive those programs via primary signals from ABC's affiliates in Wilmington, Reading and Philadelphia (Fdgs. 44-45; cf. Fdg. 73).

Had the Examiner recognized, as the Commission's definitions of secondary and primary service require and the uncontradicted engineering exhibits disclose, that the loss figures of 17,200,000 and 976,000 are of necessity composed entirely of persons residing in rural areas, he could never have concluded, as he did, that a majority of those who would lose service from WABC would continue to have access to the programs of the ABC radio network via primary service provided by other affiliates of ABC operating on channels with high nighttime limitations (see WABC, Ex. 105, Appendix C. pp. 1-13). He would perforce have been compelled to conclude that the vast majority of the population losing a service from WABC (in fact almost 16 million of the 17.2 million in its secondary service area and almost 900,000 of the 976,000 persons in its primary service area, or a total of almost 17 million persons), lack access to the programs of the ABC network via a primary signal, and would hereafter be

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dependent on 0-2 intermittent skywave signals for the program service of that network (see Exceptions 27-29).

The foregoing facts in turn would have rendered pointless the Examiner's carping on ABC's failure to adduce evidence on whether its Class II, III and IV affiliates carry a complete complement or a lesser number of the ABC network offerings (Fdgs. 39, 41, 50 (c), 73). Those 46 affiliates in the primary and secondary loss areas could carry every

program on the ABC network schedule and almost 17 million people would still be dependent on skywave signals as their sole means of receiving the program service rendered by the ABC network, in the event WABC were required to directionalize. And since a very small portion of the secondary loss area would be without even an ABC skywave service, 35% thereof and substantially the entire primary loss area would be dependent on a single skywave signal (WLS), and the remaining loss area on two such signals (WLS and KXEL), the areas and population in question, even if those two skywave stations carried the entire network schedule, would not have a truly dependable means of receiving the program service of the ABC radio network, in view of the unreliability of one or two skywave signals from stations limited to 50 kw of power (WABC, Ex. 101, p. 15; T. 117-119), a fact elsewhere tacitly recognized by the Examiner

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(cf. Examiner's Fdgs. 47 and 48). And if either or both of those two stations, because of talent conflicts, local program obligations, or not being ordered by the particular sponsor, did not carry a particular network program, that particular program would be "blackout" and not available to almost 17 million persons in the loss areas (see Exception 29).

Furthermore, since the number of persons in the loss areas who would have a choice in the matter would be almost de minimis, the Examiner's dissertation on listeners preferring a primary (or "inside" signal) to a skywave signal thus becomes almost pointless (Fdgs. 34, 46, 49(a), 68). And since 5,667,808 in the secondary loss area (with all deference to the Examiner) do not receive a primary signal of any kind, they most certainly have no choice on this score, and ABC, even at present in competing for their attention, has fewer than one-third the number of Class I (skywave) affiliates by which to reach them as does either of its major network competitors (WABC, Ex. 101, pp. 15, 16, 18) -- elsewhere characterized by the Examiner as NBC's and CBS's already "overwhelming superiority" (Fdg. 69).



In short, by not understanding the full import of the basic engineering data which is otherwise undisputed, the Examiner was blissfully unaware that the uncontro-

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It did not have before it then, as it now has, an amended rule (Sec. 3.22(a)) permitting Class II-A stations on 670 kc in Idaho, on 720 kc in Nevada or Idaho, and on 1180 kc in Montana -- designed to bring primary service to those relatively small and unpopulated portions of Idaho and Montana which are presently limited to two and three skywave services and which were seized upon in 1958 to justify the loss by WABC (under 1950 figures) of some 13,500,000 persons (33% of whom had no primary service at night).

On the basis of the evidence here adduced and on the basis of the accompanying exceptions, when considered in the light of the Court's directive to the Commission, by one proceeding or by multiple proceedings, to accord to ABC "treatment comparable to that accorded other networks," and not to require ABC to share a channel if other networks are given full use of their New York channels, it is submitted that the Commission's failure to date to provide facilities to the ABC network in New York on a basis which is fair and equitable in comparison

[ 795]

with those provided its two major competitors, should (in the language of Issue 2) vary the conclusions heretofore reached to permit two Class I operations on 770 kc. By receding from its 1958 action on 770 kc in Docket 6584, as it did in 1959 by receding from its corresponding 1958 proposals for 660 kc, 880 kc, 1100 kc, and 1200 kc and as it subsequently did in 1961 with respect to all 24 U.S. Class I-A clears except 770 kc, the Commission will bring more nearly back into line with each other the facilities of the three networks in New York, the Court's admonition will

have been met, and the errors committed in singling out 770 kc and refusing to permit comparable showings (in one proceeding or the other) on the frequencies 660 kc, 880 kc, and 1180 kc substantially cured.

### C. Feasible Alternatives

During the pendency of the Clear Channel proceeding (1945-1961), not knowing until the September 1961 decision was released whether any of the other 24 Class I-A Clear Channels were to be duplicated or in what fashion, ABC vigorously opposed the placement of a second unlimited time operation on 770 kc (either Class I or Class II). However, with the Commission having now concluded in Docket 6741 that a Class II-A operation should be permitted on each of 11 U. S. Class I-A clears in a designated state or states in the west, with the new Class II-A stations protecting the present 0.5 mv/m 50% skywave contour of the dominant station, ABC expressly authorized its counsel to make the following statement on the record in this proceeding

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(T. 353-354):

In the event the decision thus reached in the Clear Channel Proceeding is not hereafter substantially changed, as a result of petitions for reconsideration now pending and as a result of any subsequent court review thereof, I am authorized to state that ABC is prepared to acquiesce in the placement of a second station on 770 kc in the Rocky Mountain area, provided WABC (like the Class I-A stations on the eleven clear channels which were broken down in Docket No. 6741) is not required to directionalize, and provided the second station placed on 770 kc (like the eleven Class II-A stations contemplated in Docket No. 6741) is required to protect WABC's 0.1 mv/m contour daytime and its 0.5 mv/m 50 per cent skywave contour nighttime.

In here indicating a willingness to have a Class II-A facility

placed on 770 kc, in the same fashion that the Commission in the Clear Channel proceeding has proposed to place Class II-A stations on eleven other clear channels, we are not thereby conceding that NBC's owned and operated station on 660 kc in New York would not continue, under such a setup, to enjoy a preferred position over ABC's flagship operation on 770 kc. However, we do concede that such treatment would place us on a par with that proposed in Docket No. 6741 for the CBS clear channel station in New York City.

If the Commission were to take the same action on 770 kc as it did with respect to the clear channels which were broken down in Docket 6741 (amended Rule 3.22(a)), i. e. authorize a Class II-A operation thereon in a designated western state, with such station required to protect WABC's 0.5 mv/m 50% skywave contour, ABC would still be receiving less favorable treatment than NBC did on its untouched frequency of 660 kc (on which action was deferred), a difference which could become substantial if superpower is ever authorized on the clears which were not broken down

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in the West. <sup>1/</sup> However, ABC is prepared to waive the disparity in the interest of terminating this prolonged controversy.

If the Commission were to take such action, WABC (like CBS and NBC) would not be required to directionalize, thus obviating capital expenditures by ABC which could run well into six figures. WABC (like WCBS and WNBC) would continue to serve some 42,000,000 people. Some 900,000 persons to whom WABC presently renders a primary service would not hereafter be largely dependent on the skywave signal of WLS for the nighttime programs of the ABC radio network. In excess of 80% of 17,200,000 persons in the differential area (of whom 5,667,000 are entirely dependent on skywave signals for a nighttime radio service) would at least be assured 1-3 skywave signals (rather than 0-2) as

potential sources for the program service provided by the ABC radio network, still far fewer than either CBS or NBC presently has in that area.

If the Commission were to take such action, it would eliminate the anomalous situation of singling out 770 kc as the only one of the 25 U. S. Class I-A channels which is being "broken down" and required to directionalize in order to accommodate a Class I (skywave) operation in the West. The Commission would be consistent -- it would be emphasizing primary coverage on all channels broken down to date, leaving the shortage of skywave signals in the West to be met by the new Class II-A stations and by possible superpower on the 12 channels on which action was

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<sup>1/</sup> Cf. FCC Statement, p. 18, where the Commission admitted that superpower was probably out of the question on 770 kc (if two Class I stations continued to operate thereon), though arguing that superpower might still be possible on the 11 channels on which Class II-A's were permitted.

deferred. With the Commission on record that multiple competitive radio networks are in the public interest, ABC's presently inferior position from the standpoint of coverage through owned and affiliated outlets would not be aggravated. And the Commission would, at long last, be heeding the Court's admonition in 1960 that ABC is entitled to treatment comparable to that ultimately accorded to the other networks in the then-undecided Clear Channel Proceeding -- that it should not be required to share its New York channel if the other networks are given full use thereof.

Certainly KSTP, Inc., which acquired KOB in 1957 with knowledge of the controversy over its operating assignment, would have no just cause for complaint if KOB were to operate unlimited time on 770 kc with 50 kw, DA-N, as a Class II-A station. Operating in that fashion

KOB would have substantially greater coverage at night than it now has (770 kc, 50 kw day, 25 kw night, DA-N), and in fact greater coverage than it has ever heretofore enjoyed, either before or since NARBA. <sup>1/</sup>

While KOB operating as a Class I station on 770 kc (50 kw, U, DA-N), by virtue of a lower nighttime limitation accomplished through WABC directionalizing, would provide a primary service at night to more people than it would as a Class II-A operation (50 kw, U, DA-N), the same is true of the eleven other channels

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<sup>1/</sup> As noted by ABC in its Preliminary Statement to its proposed findings and conclusions, KOB never operated with more than 10 kw on 1180 kc. Nor has it ever operated to date with more than 25 kw power at night on either 1030 kc or 770 kc (see Exception 2).

[ 799 ]

on which the Commission in its 1961 decision decided to place Class II-A operations. In other words, if the dominant stations on 670, 720, 780, 880, 890, 1020, 1030, 1100, 1120, 1180 and 1210 had been ordered to directionalize, the new stations in the west on those channels would have provided primary service at night to more people than they do as Class II-A operations protecting the existing skywave contours of the dominant stations. But the Commission, because of "dislocations" not "compensated for" by new service, discarded that approach in its Third Notice in 1959 and its Clear Channel decision in 1961 (31 FCC 565, 574, para. 23) <sup>1/</sup>. The present record shows that that approach should be discarded here.

Since Nevada, Idaho, Wyoming, Montana and other Rocky Mountain states would also gain more primary service if the new stations were allowed to operate as Class I's rather than Class II-A's, with the present dominant station directionalizing and thereby lowering the new stations' nighttime limitations, there appears no sound basis why the people of New Mexico should be favored over the people of the other Rocky Mountain states, not to mention why in excess of 80% of the



17, 200, 000 persons in the East should be left with no means (other than 0-2 fluctuating

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<sup>1/</sup> Cf. FCC Statement, p. 24, where the Commission assured Congress, in response to criticism of the breakdown of 850 kc (KOA) by placing two Class I stations and still other Class II's thereon, that "the present Commission has no intention whatever to break down any of the I-A channels on the same basis."

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and fading skywave signals) by which to receive the program service furnished by the ABC radio network.

Furthermore, since the relatively small population to which KOB would bring a first primary service at night, if it operated as a Class I rather than as a Class II-A facility on 770 kc, already receives 8-11 secondary signals from stations which, like KOB, are affiliated with NBC, the need of 67,000 people for a primary service at night by another NBC affiliate scarcely justifies action which would leave almost 900,000 (who now receive a primary service from WABC) entirely dependent on a skywave signal from WLS for the programs of the ABC radio network, nor action which would deprive 17,200,000 persons of WABC's present secondary service, bearing in mind that 5,667,000 people in the differential area have no primary service of any kind, that in excess of 80% thereof do not receive primary service from any station associated with ABC, and that almost 16,000,000 persons would thus be left hereafter with no reliable means of receiving the program service provided by the ABC radio network.

Accordingly, on the basis of the evidence adduced in the instant further hearing in Docket 6784, when considered in the light of the Commission's intervening action in Docket 6741, an ultimate conclusion by the Commission along the following lines is respectfully requested:

"At the time that we decided in Docket 6584 (September 3, 1958) to permit two Class I operations

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on 770 kc, by requiring WABC to directionalize and to give up 60% of its secondary service area, we were then proposing, by virtue of our Second Notice of April 15, 1958 in Docket 6741, to require WNBC and WCBS to directionalize their operations in New York on 660 kc and 880 kc in like fashion so as to permit Class I operations thereon in Montana and Wyoming. We have since concluded (in our Third Notice of September 22, 1959 and our final decision of September 13, 1961 in Docket 6741) that the dislocations in existing skywave coverage would not be offset by new operations of this type and have accordingly abandoned the dual Class I approach as a means of providing additional skywave service in the west, not only on 660 kc and 880 kc but on the other channels on which duplicate use was permitted in Docket 6741.

"Having concluded in Docket 6741 to defer action on 660 kc and to require the new Class II-A operation on 880 kc to protect the existing 0.5 mv/m 50% skywave contour of station WCBS (thus fully protecting the existing usable service contours of both NBC and CBS), it is apparent that the different action which we took in Docket 6584 on the one hand, and in Docket 6741 on the other, does not (in the language used by us in Issue 2 and by the Court in its 1960 decision) provide "facilities to the ABC Network in New York on a basis which is fair and equitable in comparison with other radio networks,"

[ 802]

and that this fact, in the light of intervening developments and the evidence here adduced, and the Court's 1960 caveat that ABC should not be required to share a channel if the other networks were subsequently given full use of their channels, requires us to vary the conclusion heretofore reached in 1958 that two Class I facilities should be permitted on 770 kc.

"After carefully considering the evidence here adduced and the policies enunciated in Docket 6741, we have concluded (a) to amend Rule 3.22(a) by adding Channel 770 to the eleven channels there listed and to provide for an unlimited time Class II-A assignment thereon in the state of New Mexico, and (b) to abandon on 770 kc. as we have on the other 24 U. S. Class I-A channels in Docket 6741, the dual Class I "dislocation" approach to the skywave shortage problem in the west, expecting that problem to be alleviated by the primary service authorized on the 12 channels on which we are permitting Class II-A operations, and realizing that the remaining 12 U. S. Class I-A channels on which action has been deferred will be available for superpower or Class II-A use at a later date.

"We thus conclude that the public interest will be served (a) by granting the application of American Broadcasting-Paramount Theatres, Inc. for renewal of license of Station WABC (BR-107) as a Class I facility

[ 803]

on 770 kc, 50 kw, U, New York, N. Y., subject to the right of KSTP, Inc., to a hearing on its pending application for 770 kc in New York City in the event KSTP, Inc. elects to prosecute said application in view of the conclusions here reached, and (b) by denying the application of KSTP, Inc. for Class I facilities on 770 kc in Albuquerque, N. Mex. (BMP-1738), with leave to KSTP, Inc. to amend that application to request a construction permit and license as a Class II-A station on 770 kc (50 kw, U, DA-N), in lieu of its present STA Class II operation on 770 kc (50 kw day, 25 kw night DA-N)."

Respectfully submitted,

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.

By Mortimer Weinbach  
7 West 66th Street  
New York 23, N. Y.

James A. McKenna, Jr.  
Vernon L. Wilkinson  
McKenna & Wilkinson  
\* \* \*  
Washington 6, D. C.

July 12, 1962

Its Attorneys

[ 804 ]

A F F I D A V I T

CITY OF WASHINGTON )  
 ) SS  
 DISTRICT OF COLUMBIA)

Frank G. Kear, having been duly sworn, deposes and says:

1. That he is a qualified engineer engaged in consulting engineering in the City of Washington, District of Columbia; that he has been granted registration to practice as a Professional Engineer in the District of Columbia; that he is a member of the firm of Kear and Kennedy, and that his qualifications are a matter of record with the Federal Communications Commission.

2. That the firm of Kear and Kennedy has been retained by American Broadcasting-Paramount Theatres, Inc., licensee of Station WABC, New York, New York (770KC, 50KW-U, BR-167), for the performance of certain engineering duties with respect to the Examiner's Initial Decision in the WABC-KOB case, Docket No. 6584 and Docket 14225 (May 29, 1962).

3. That he has prepared or caused to be prepared under his immediate supervision, the attached Engineering Statement in accordance with the FCC Rules Governing Radio Broadcast Services and the WABC/KOB Stipulation No. 1.

4. That the foregoing statements and the aforementioned Engineering Statement are true and correct of his own knowledge except such statements as are on information and belief, and as to such statements, he believes them to be true.

/s/ Frank G. Kear

Subscribed and sworn to before me this 10th day of July 1962.

\_\_\_\_\_  
 Notary Public, D.C.

\* \* \*

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### ENGINEERING STATEMENT

This engineering statement has been prepared on behalf of American Broadcasting-Paramount Theatres, Inc., licensee of Station WABC, New York, New York (770 kc, 50 kw-U, BR-167) relative to the Examiner's Initial Decision in the WABC/KOB Hearings, Dockets 6584 and 14225 (May 29, 1962).

#### Population (Rural) in WABC Secondary Differential Area (17, 213, 848)

The population figure of 17, 213, 848 for the WABC secondary differential area (loss area) as illustrated in WABC Exhibit 101, Figure 1, pages 10 and 11, represents rural population only in an area that is bounded by the WABC 0.5 mv/m 50% non-directional skywave contour and the WABC 0.5 mv/m 50% skywave contour for directional mode of operation. Since none of the secondary differential area would be served by a 2.0 mv/m signal from WABC, all cities and towns of 2500 and over have been deleted from the total population. This is the method for determining population as spelled out in Section 3.182 of the Commission's Rules. It is also the method outlined in the ground rules in the WABC/KOB hearing for the determination of population in skywave areas, (WABC, Exhibit 105, page 8, paragraph IX(a); i.e., WABC/KOB Stipulation No. 1).

#### Total Population Between WABC Non-Directional and the Directional 0.5 MV/M 50% of the Time Contours (48, 314, 635)

It should be noted that in that area which is bounded by the WABC 0.5 mv/m 50% skywave contours the magnitude of total population is 48, 314, 635 as shown in the 1960 U. S. Census Reports. (WABC, Exhibit 101, Figure 9, page 20).



ORDER

At a session of the Federal Communications Commission held at its offices in Washington, D. C. on the 24th day of July, 1963;

The Commission having under consideration (1) the matters of record in this proceeding; (2) a petition for stay, filed July 17, 1963, by American Broadcasting-Paramount Theatres, Inc. (WABC) seeking a stay of the "30-day" period specified in our Decision of July 8, 1963, for the filing of an application for modification of facilities on the frequency 770 kc in conformity with the parameters specified in paragraph 22 of our September 1958 Decision; and (3) the opposition thereto, filed July 22, 1963, by Hubbard Broadcasting, Inc., as licensee of KOB, Albuquerque, New Mexico; and

IT APPEARING, That it would be appropriate to stay the running of the above-described "30 day" period until a final court order concluding judicial review;

ACCORDINGLY, IT IS ORDERED, That (1) the 30-day period specified in our July 8th decision for the filing of a directional proposal is STAYED pending the issuance of a final court order concluding judicial review; and (2) ABC's petition for stay is GRANTED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Ben F. Waple  
Secretary

(SEAL)

Released: July 26, 1963

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FCC Form 303  
July 1954  
Section I

Form Approved  
Budget Bureau No. 52-8016-12

UNITED STATES OF AMERICA  
FEDERAL COMMUNICATIONS COMMISSION

APPLICATION FOR RENEWAL OF BROADCAST STATION LICENSE

INSTRUCTIONS

A. This form is to be used in all cases when applying for Renewal of Broadcast Station License. It consists of this part, Section I, and the following sections:

Section II, Renewal Application Engineering Data

Section IV, Statement of Program Service of Broadcast Applicant

B. Prepare and file three copies of this form and all exhibits and swear to one copy. File with Federal Communications Commission, Washington 25, D. C.

C. Number exhibits serially in the space provided in the body of the form and list each exhibit in the space provided on page 2 of this Section. Date each exhibit.

D. The name of the applicant must be stated exactly as it appears on the current license.

E. Information called for by this application which is already on file with the Commission need not be refilled in this application provided (1) the information is now on file in another application or FCC form filed by or on behalf of this applicant; (2) the information is identified fully by reference to the file number (if any), the FCC form number, and the filing date of the application or other form containing the information and the page or paragraph referred to, and (3) after making the reference, the applicant states: "No change since date of filing." Any such reference will be considered to incorporate into this application all information, confidential or otherwise, contained in the application or other form referred to. The incorporated application or other form will thereafter, in its entirety, be open to the public.

F. This application must be executed by applicant, if an individual; by a partner of applicant, if a partnership; by an officer of applicant, if a partnership; by an officer of applicant, if a corporation or association; or by attorney of applicant only under conditions shown in Section 1.308, Rules Relating to Practice and Procedure, in which event satisfactory evidence of disability of applicant or his absence from the Continental United States and authority of attorney to act must be submitted with application.

G. BE SURE ALL NECESSARY INFORMATION IS FURNISHED AND ALL PARAGRAPHS ARE FULLY ANSWERED. IF ANY PORTIONS OF THE APPLICATION ARE NOT APPLICABLE, SPECIFICALLY SO STATE. DEFECTIVE OR INCOMPLETE APPLICATIONS MAY BE RETURNED WITHOUT CONSIDERATION.

\* See Master Exhibit J, Booklet 10046 filed 7/12/51; statement referred to in Sec. I, Que. 2 of FCC Form 303 for WXYZ, File No. BR-328, & statement referred to in Sec. I, Que. 2 of FCC Form 303 for KMO-TV, File No. BR-62.

File No.

BR-167

Name and post office address of applicant (See Instruction D)  
**American Broadcasting-Paramount  
Theatres, Inc.  
7 West 66th Street  
New York 23, New York**

Send notices and communications to the following named person at the post office address indicated:

**Mortimer Weinsbach**

1. Renewal requested for following existing facilities

Call letters **WABC** Frequency **8** Channel No. **139**

Power in kilowatts Minimum hours operation daily

Night **50** Day **50**

Hours of operation

Unlimited ☒ Sharing with (Specify Stations) **None** Other (Specify) **None**  
Daytime only ☐  
Limited ☐

Station location

City **New York** State **New York**

2. Is applicant or any person directly or indirectly controlling applicant, party to a suit in any Federal Court involving the monopolizing, or an attempt to monopolize radio communication directly or indirectly through control of the manufacturer or sale of radio apparatus, by exclusive traffic arrangements, or by any other means, or of using unfair methods of competition? ☒ Yes ☐ No

If the answer is "Yes", attach as Exhibit No. a full description of the proceeding, identifying the court and showing where records of the proceeding may be obtained. (See Section 313 of the Communications Act of 1934.)

3. Attach as Exhibit No. **1** a detailed balance sheet of the applicant as at the close of a month within 90 days of the date of this application.

4. Is the applicant's Ownership Report filed with this application? ☐ Yes ☒ No

(See 1.343(a) of Commission's Rules.)  
If answer is "No", give date of filing of last Ownership Report and call letters, station location and file number of renewal application with which it was filed. **See FCC Form 323 dated 3/1/57 as supplemented through 9/22/59.**

5. Any change in the citizenship of the applicant? ☐ Yes ☒ No

6. Is the applicant a representative of an alien or foreign government? ☐ Yes ☒ No

7. List below other businesses in which the applicant or any officer, director, or principal stockholder (any person owning 25% or more of applicant's stock) has a 25% or more interest. List also any radio station other than the station which is the subject of this application in which any of the above named persons have any interest, and the nature and extent of their interest in the broadcast station.

**See Exhibit 2**

**WABC-**

**1**

FCC Form 303

Section I, Page 2

The applicant waives any claim to the use of any particular frequency or of the other as against the regulatory power of the United States because of the previous use of the same, whether by licensee or otherwise, and requests a removal of its existing license in accordance with this application. (See Section 304 of the Communications Act of 1934)

The applicant represents that this application is not filed for the purpose of impeding, obstructing, or delaying determination on any other application with which it may be in conflict.

All the statements made in the application and attached exhibits are considered material representations, and all the exhibits are a material part hereof and are incorporated herein as if set out in full in the application.

The applicant, or the undersigned on the applicant's behalf, states that he has endeavored to supply full and correct information as to all matters which are relevant to this application and that he has done so as to all matters within his own knowledge.

Dated this 6<sup>th</sup> day of October, 19 59

American Broadcasting-Paramount Theatres, Inc.  
(Name of applicant)

By Mortimer Weinbach  
Mortimer Weinbach  
Assistant Secretary  
Title

Subscribed and sworn to before

me this 6<sup>th</sup> day of October, 19 59

SEAL

(Notary public's seal must be affixed where the law of jurisdiction requires, otherwise state the law does not require seal.)

Joseph M. Mark  
Notary Public

My commission expires \_\_\_\_\_

EXHIBITS furnished as required by this form:

Exhibit No.	Section and Para. No. of Form	Name of officer or employee (1) by whom or (2) under whose direction exhibit was prepared (show which)	Official title
1	I-3	Simon E. Siegel (2)	Financial Vice President and Treasurer
2	I-7	Mortimer Weinbach (2)	Assistant Secretary
3	II-12	Frank Marx (2)	Vice President of American Broadcasting Company Division
4	IV-2(b)	Ben Hoberman (2)	General Manager (WABC)
5	IV-5(a)	Ben Hoberman (2)	General Manager (WABC)
6	IV-7	Ben Hoberman (2)	General Manager (WABC)

Broadcast Application				FEDERAL COMMUNICATIONS COMMISSION				Section II				
RENEWAL APPLICATION ENGINEERING DATA				Name of applicant <b>American Broadcasting-Paramount Theatres, Inc.</b>								
1. Description of transmitting apparatus								5. Frequency monitors and control equipment				
Visual		Make	Type No.	Serial No.		Visual		Manufacturer's name		Type No.		
Aural		<b>RCA</b>	<b>50 B</b>	<b>2016</b>		Aural		<b>RCA</b>		<b>KX-4180</b>		
Tubes in last radio stage								How often is the station frequency and the frequency monitor checked with a frequency standard of known accuracy?				
Visual		Make	Type No.	Number used		<b>Once every 3 months by Press Wireless Inc.</b>						
Aural		<b>RCA</b>	<b>862 A</b>	<b>2</b>		Automatic frequency control equipment						
2. Operating constants (FM and Television only)								Make				Type No.
								<b>RCA</b>				<b>2016 A</b>
Total plate current to last radio stage in amperes								Furnish following data on last frequency checks				
Plate voltage applied to last radio stage in volts								Date				Frequency
Plate input power to the last radio stage in kilowatts								<b>7-5-59</b>				<b>769.999 KB</b>
Efficiency Factor F of the transmitter at operating power								Reading of monitors				Method used (Use reverse side of this sheet)
RF transmission line meter reading								<b>770,000</b>				
3. Indicating instruments: (Standard Broadcast only)								6. Modulation monitors				
Range		Normal Reading		Visual		Aural		Manufacturer's name		Type No.		
Day		Night						Visual				
Plate voltmeter		<b>0-25KV</b>	<b>18 KV</b>	<b>18 KV</b>				Aural		<b>RCA</b>		
Plate ammeter		<b>0-10</b>	<b>8.4 A</b>	<b>8.4 A</b>						<b>66-A</b>		
Antenna ammeter		<b>0-25</b>	<b>16.3 A</b>	<b>16.3 A</b>								
4. Directional antenna operating values (Standard Broadcast only)								7. Phase monitor (if used)				
Phase reading in degrees		Antenna base current		Remote indication of antenna current		Make		Type				
Night		Day		Night		Day		<b>Not Used</b>				
Tower												
#1		<b>Does Not Apply</b>										
#2												
#3												
#4												
#5												
#6												
Manufacturer and type of phase monitor used in taking above readings:								8. Give date of last tower repainting				
								<b>6-24-59</b>				
Describe equipment used for remote indication of antenna currents (phase monitor or other method)								9. Have changes been made in the fundamental audio or radio circuits of the transmitter affecting the schematic diagram heretofore filed with the Commission? If the answer is "Yes" attach as Exhibit No. an accurate corrected diagram, and brief explanation.				
								Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>				
								10. (a) Have equipment performance measurements been made within the past four months? <b>6-14-59</b>				
								(b) Give date of last measurements.				
								<b>6-14-59</b>				
								(c) Do these measurements show the transmitting system performance to be in accordance with the Standards of Good Engineering Practice? (If the answer to either of the above questions is "No", attach as Exhibit No. a complete explanation.)				
								Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>				
								11. In what respect, if any does the apparatus, antenna, or operation differ from that described in the last application for license or renewal of license?				
								<b>None</b>				
								12. Attach as Exhibit No. 3 the original or one exact copy of the transmitter operating logs for the seven days comprising the composite week analyzed in Section IV of the application. If original logs are submitted they will be returned. (For Standard Broadcast Only)				

## RENEWAL APPLICATION ENGINEERING DATA

Section II, Page 2

I certify that I am the ~~Technical-Director~~ Chief Engineer ~~or Consulting-Engineer~~ for the applicant of the radio station for which this application is submitted and that I have examined the foregoing statement of technical information and that it is true to the best of my knowledge and belief. (This signature may be omitted provided the engineer's original signed report of the data from which the information contained herein has been obtained is attached hereto.)

  
Technical-Director, Chief Engineer or Consulting Engineer

Date

10/3/50



Broadcast Application		FEDERAL COMMUNICATIONS COMMISSION		Section IV
<b>STATEMENT OF PROGRAM SERVICE OF BROADCAST APPLICANT</b>		Name of applicant  <b>American Broadcasting-Paramount Theatres, Inc.</b>		
<b>NOTICE TO ALL APPLICANTS</b>				
The replies to the following questions constitute a representation of programming policy upon which the Commission will rely in considering the application. It is not expected that licensee will or can adhere inflexibly in day-to-day operation to the representation here made. However, since such representation will constitute, in part, the basis upon which the Commission acts on the application, time and care should be devoted to the preparation of the replies so that they will reflect accurately applicant's responsible judgment of his proposed programming policy.				
<b>INSTRUCTIONS</b>				
1. Paragraphs 1 to 4 are divided into a left-hand column which pertains to past operation and a right-hand column which pertains to proposed operation. Applicants for new stations or assignees or transferees of existing stations are to fill in only the right-hand column while applicants for authorizations for renewal of existing station licenses are to fill in both columns. 2. Program data on past performance are to be based on the composite week for the year preceding the date of application except in the case of renewal applications where the year preceding the expiration date of the existing license is to be used. The days comprising the composite week of each year will be designated by public notice on or about November 1st of that year. 3. Program classifications incident to the replies to Paragraphs 2, 3, and 4 below, are to be in accordance with the definitions on Page 4 of this Section. 4. Assignees or transferees filing FCC Form 314 or 315 need not complete paragraphs 5 or 6.				
<b>PAST OPERATION</b>		<b>PROPOSED OPERATION (for a typical week)</b>		
1. (a) State actual minimum weekly schedule of operation under the present authorization, giving opening and closing time and total hours for weekdays and Sunday. <b>5:55 AM - 5:55 AM Mon.-Sat.</b> <b>7:58 AM - 5:55 AM Sunday</b> <b>Total weekday-144 hrs. Total Sun.-22 hrs.</b>		(b) State minimum weekly schedule of operation proposed by licensee, permittee, assignee or transferee, giving opening and closing time and total hours for weekdays and Sunday. <b>5:55 AM - 5:55 AM Mon.-Sat.</b> <b>7:58 AM - 5:55 AM Sunday</b> <b>Total weekday-144 hrs. Total Sun.-22 hrs.</b>		
2. (a) State for the composite week the percentage of time which was devoted to each of the following types of program (totals to equal 100%).		(b) State the percentage of time to be devoted to each of the following types of program for a proposed typical week of operation under the authorization requested (totals to equal 100%). Attach program schedule for this proposed typical week and indicate thereon the class of each program in accordance with paragraph 4(b).		
(1) Entertainment (include here all programs which are intended primarily as entertainment, such as music, drama, variety, comedy, quiz, breakfast, children's, etc.)	<u>75.0</u> %	(1) Entertainment (include here all programs which are intended primarily as entertainment, such as music, drama, variety, comedy, quiz, breakfast, children's, etc.)		
(2) Religious (include here all sermons, religious news, music, and drama, etc.)	<u>8.7</u> %	(2) Religious (include here all sermons, religious news, music, and drama, etc.)		
(3) Agricultural (include here all programs containing farm or market reports or other information specifically addressed to the agricultural population)	<u>.1</u> %	(3) Agricultural (include here all programs containing farm or market reports or other information specifically addressed to the agricultural population)		
(4) Educational (include here programs prepared by or in behalf of educational organizations, exclusive of discussion programs which should be classified under (6) below)	<u>.4</u> %	(4) Educational (include here programs prepared by or in behalf of educational organizations, exclusive of discussion programs which should be classified under (6) below)		
(5) News (include here news reports and commentaries)	<u>14.0</u> %	(5) News (include here news reports and commentaries)		
(6) Discussion (include here forum, panel and round-table programs)	_____ %	(6) Discussion (include here forum, panel and round-table programs)		
(7) Talks (include here all conversation programs which do not fall under Points (2), (3), (4), (5), or (6) above, including sports)	<u>1.8</u> %	(7) Talks (include here all conversation programs which do not fall under Points (2), (3), (4), (5), or (6) above, including sports)		
(8) _____	_____ %	(8) _____		
(9) _____	_____ %	(9) _____		
(10) Miscellaneous	_____ %	(10) Miscellaneous		
100		100		

See Exhibit 4.

**Until and unless changing conditions and developments warrant departure, licensee intends to adhere to the percentages presently in effect.**

## Broadcast Application

## STATEMENT OF PROGRAM SERVICE

Section IV, Page 2

3. (a) Dividing the broadcast week into 15 minute periods, specify below the number of 14 1/2 minute periods within such 15 minute periods during the composite week in which were broadcast (exclusive of non-commercial spot announcements, call letter announcements and promotional announcements for sustaining programs):

	No. of 14 1/2 minute periods
(1) No spot announcements or commercial continuity	<u>347</u>
(2) One spot announcement	<u>130</u>
(3) Two spot announcements	<u>83</u>
(4) Three spot announcements	<u>33</u>
(5) Four spot announcements	<u>12</u>
(6) Five or more spot announcements	<u>9</u>
Total number of 14 1/2 minute periods	<u>664</u>

State the number of spot announcements (exclusive of non-commercial spot and call letter announcements, and promotional announcements for sustaining programs) broadcast during the composite week which exceeded one minute in length 0  
(See definition of spot announcement)

(b) State what the practice of the station will be with respect to the number and length of spot announcements allowed in a given period. **The practice of the station, with minor exceptions, is to permit not more than three spot announcements to be broadcast in a given 15-minute period. Generally, the length of such announcements may not exceed one minute except for such programs as shopping guides and participation programs. Where such exceptions have been permitted, care has been exercised to restrict their distribution in order to preserve the program balance necessary to the public interest. It is anticipated that the commercial standards of the NAB Code will be adhered to and the exceptions occurring in the above mentioned program categories will be limited to a total of not more than one hour a broadcast day.**

4. In the tables below the percentages for each segment are to be computed on the basis of 100 percent of the operating hours within the particular segment for the seven days comprising the composite week (i.e., if full time operation, 70 hours for the 8 a.m. to 6 p.m. segment, 35 hours for the 6 p.m. to 11 p.m. segment, and the total weekly hours of operation between 11 p.m. and 8 a.m. for the third segment). The percentages in the column headed "Total" are to be computed on the basis of 100 percent of operating hours for the seven days.

The exact number of spot announcements should be stated, including those broadcast within participating programs, but excluding call letter announcements (call letters and location) and promotional announcements for sustaining programs.

NOTE: The purpose of the following tabulation is to enable the Commission to secure quantitative data as to the proportion of time (to be) devoted to the various classes of programs. The function of each class of program as part of a diversified program structure is discussed in the Commission's Report of March 7, 1946, entitled "Public Service Responsibility of Broadcast Licensees".

(a) State the percentage of time which was devoted to each of the following classes of programs during the composite week.

	PROGRAM LOG ANALYSIS (in percentages)			
	8 a.m.- 6 p.m.	6 p.m.- 11 p.m.	All other hours	Total
(1) Network commercial (NC)	<u>18.8</u>	<u>12.5</u>	<u>.1</u>	<u>10.4</u>
(2) Network sustaining (NS)	<u>8.7</u>	<u>19.7</u>	<u>.3</u>	<u>8.1</u>
(3) Recorded commercial (RC)	<u>36.2</u>	<u>11.5</u>	<u>17.2</u>	<u>23.8</u>
(4) Recorded sustaining (RS)	<u>24.3</u>	<u>33.7</u>	<u>55.7</u>	<u>38.0</u>
(5) Wire commercial (WC)	<u>.03</u>	<u>-</u>	<u>-</u>	<u>.1</u>
(6) Wire sustaining (WS)	<u>.02</u>	<u>-</u>	<u>4.3</u>	<u>1.6</u>
(7) Live commercial (LC)	<u>7.8</u>	<u>18.6</u>	<u>17.6</u>	<u>13.7</u>
(8) Live sustaining (LS)	<u>4.15</u>	<u>4.0</u>	<u>4.8</u>	<u>4.3</u>
(9) Total commercial (1+3+5+7)	<u>62.83</u>	<u>42.6</u>	<u>34.9</u>	<u>48.0</u>
(10) Total sustaining (2+4+6+8)	<u>37.17</u>	<u>57.4</u>	<u>65.1</u>	<u>52.0</u>
(11) Complete Total	<u>100%</u>	<u>100%</u>	<u>100%</u>	<u>100%</u>
(12) Actual broadcast hours (per week)	<u>70</u>	<u>35</u>	<u>61</u>	<u>166</u>
(13) No. of spot announce- ments (SA) (per week)	<u>499</u>	<u>201</u>	<u>196</u>	<u>896</u>
(14) No. of non-commercial spot announcements (NCSA) (per week)	<u>57</u>	<u>38</u>	<u>12</u>	<u>107</u>

(b) Show in the table below the percentage of time proposed to be devoted to each of the following classes of programs during a proposed typical week of operation.

	PROGRAM LOG ANALYSIS (in percentages)			
	8 a.m.- 6 p.m.	6 p.m.- 11 p.m.	All other hours	Total
(1) Network commercial (NC)	<u>Until and unless</u>			
(2) Network sustaining (NS)	<u>changing conditions</u>			
(3) Recorded commercial (RC)	<u>and developments</u>			
(4) Recorded sustaining (RS)	<u>warrant departure,</u>			
(5) Wire commercial (WC)	<u>Licensee intends to</u>			
(6) Wire sustaining (WS)	<u>adhere to the</u>			
(7) Live commercial (LC)	<u>percentages presently</u>			
(8) Live sustaining (LS)	<u>in effect.</u>			
(9) Total commercial (1+3+5+7)	<u>=====</u>	<u>=====</u>	<u>=====</u>	<u>=====</u>
(10) Total sustaining (2+4+6+8)	<u>=====</u>	<u>=====</u>	<u>=====</u>	<u>=====</u>
(11) Complete Total	<u>100%</u>	<u>100%</u>	<u>100%</u>	<u>100%</u>
(12) Proposed broadcast hours (per week)	<u>70</u>	<u>35</u>	<u>61</u>	<u>166</u>
(13) No. of spot announce- ments (SA) (per week)	<u>499</u>	<u>201</u>	<u>196</u>	<u>896</u>
(14) No. of non-commercial spot announcements (NCSA) (per week)	<u>57</u>	<u>38</u>	<u>12</u>	<u>107</u>

Broadcast Application	STATEMENT OF PROGRAM SERVICE	Section IV, Page 3		
<p>5. (a) Attach as Exhibit No. <u>5</u> the original or one exact copy of the program log for the seven days comprising the composite week analyzed in the preceding paragraphs. (If original logs are submitted they will be returned.)</p> <p>(b) What year's composite week has been analyzed in the foregoing paragraphs? <u>1958</u></p>	<p>8. If this application is for an FM authorization, will the program of any AM station operating in the same area be duplicated? If the answer is yes, <u>Not applicable.</u></p> <p>(a) How many hours per day will be devoted to duplicated programs?</p> <p>(b) Call letters and location of the AM station:</p>			
<p>6. Will the proposed station be affiliated with any network? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> If the answer is "Yes", give the name of the network. <u>American Broadcasting Company</u></p>	<p>(c) What kinds of programs (musical, sports, etc.) will be duplicated?</p>			
<p>7. Attach as Exhibit No. <u>6</u> a narrative statement on the policy to be pursued with respect to making time available for the discussion of public issues, including illustrations of the types of programs to be broadcast and the methods of selection of subjects and participants.</p>	<p>9. State the average number of hours per week which will be used in advertising or promoting any business, profession or activity other than broadcasting in which the applicant is engaged or financially interested either directly or indirectly. If this is an application for renewal of license, show this data for the past license period also. <u>Approximately 21 minutes per week during license period.</u></p> <p><u>approximately 21 minutes proposed.</u></p> <p>10. If the data furnished in response to the questions in this Section IV do not in the applicant's opinion adequately reflect station operation, attach as Exhibit No. <u>      </u> a statement setting forth any additional program data that the applicant desires to call to the Commission's attention. (If the applicant feels that the program material classified in Paragraph 2 is susceptible of classifications other than those listed he may supplement Paragraph 2 with an explanatory statement in this Exhibit.)</p>			
<p>11. If this application is for a television authorization, will programs be broadcast in color? Yes <input type="checkbox"/> No <input type="checkbox"/> If "Yes", will programs be: Network <input type="checkbox"/> Local Live <input type="checkbox"/> Local Slide <input type="checkbox"/> <u>Not applicable.</u></p>				
<p>12. State applicant's general plans for staffing the station, including the number of employees in each department (i.e. program, commercial, technical, etc.), and the names, residence and citizenship of the general manager, station manager, program director and other department heads who have been employed or whom the applicant expects to employ.</p>				
<u>Name</u>	<u>Residence</u>	<u>Citizenship</u>	<u>Position</u>	<u>No. of Employees</u>
Ben Roberson	4 Old Field Lane Lake Success, N. Y.	U.S.	General Manager	2
Barrett Geoghagan	6 North Drive Westbury, N. Y.	U.S.	Sales Manager	6
Paul Kasander	849 Custer Street Valley Stream, N.Y.	U.S.	Program & Promotion Manager	2
Thomas Mager	111 S. Prospect St. Verona, N. J.	U.S.	Merchandising Manager	2
Margaret Michaud	541 East 78th St. New York, N. Y.	U.S.	Business & Sales Service Manager	4
Shirley Laird	219 East 69th St. New York, N. Y.	U.S.	Operations Manager	2
John Bourcier	31 Ocean Parkway Brooklyn, N. Y.	U.S.	Chief Engineer <u>WAIB-CBR-167</u>	14
				13 (over)

WABC is an owned and operated station of American Broadcasting Company, a division of American Broadcasting-Paramount Theatres, Inc. Its executive offices and main studios are located in the same building in which the American Broadcasting Company maintains its offices and studios. Consequently many engineering, production, accounting and other services are furnished to WABC by the network organization.

[ 906]  
[ 1030]

1248

[ 906]

[ 1030]

**FEDERAL COMMUNICATIONS COMMISSION**  
Washington 25, D. C.

In reply refer to: 8831

American Broadcasting-Paramount Theatres, Inc.  
Radio Station W A B C  
Mr. Mortimer Weinbach  
7 West 66th Street  
New York 33, New York

KSTP, Inc.  
Mr. Stanley E. Hubbard  
3415 University Avenue  
St. Paul, Minnesota

Gentlemen:

The Commission has before it for consideration the applications of the American Broadcasting-Paramount Theatres, Inc., File No. BR-167, for renewal of the license of Station WABC, New York, New York, (770kc, 50kw, U), and of KSTP, Inc., File No. BP-13932, for a construction permit for a new standard broadcast station to operate on 770 kilocycles, with a power of 50 kilowatts, directional antenna at night, unlimited time, at New York, New York.

It appears from a review of the above applications that said applications are mutually exclusive by reason of the fact that they specify the same facilities, and that operation by both stations as proposed would result in destructive electrical interference. Accordingly, both applications cannot be granted.

In addition, with respect to the application of KSTP, Inc., it appears that the following questions exist: (1) the letter of the New York Regional Airspace Committee dated May 23, 1960, addressed to the Consulting Engineers for KSTP, Inc., a copy of which is on file with the Commission, states that the antenna towers proposed by KSTP, Inc., are objectionable



from an aeronautical viewpoint; on April 6, 1960, said Consulting Engineers for KSTP, Inc., filed photographs of KSTP's proposed transmitter site (9A, 9B and 9C), but this matter has not been submitted as an amendment to the application; and (2) the statement filed by KSTP, Inc., in response to Paragraph 3(b) of Section IV of the application form is not responsive, in that it does not indicate the number and length of spot announcements to be broadcast in a given period.

With reference to the application for American Broadcasting-Paramount Theatres, Inc., it appears that any grant which may be made to said licensee would have to be made upon the following conditions: (a) that such grant is without prejudice to whatever action the Commission may deem appropriate, in light of information developed in the pending inquiry concerning compliance with Section 317 of the Communications Act; (b) the grant herein is without prejudice to such action

[ 907]

[ 1031]

as the Commission may deem warranted as a result of its final determinations, (1) with respect to the conclusions and recommendations set forth in the report of the Network Study staff and (2) with respect to related studies and inquiries now being considered or conducted by the Commission.

In light of all of the above, the Commission is unable to find, at this time, that a grant of said applications or either of them, would serve the public interest, convenience or necessity. It appears, therefore, that said applications must be designated for hearing to determine on a comparative basis which would better serve the public interest, convenience or necessity.

This letter is being written to you pursuant to Section 309(b) of the Communications Act of 1934, as amended, to afford you an opportunity to inform the Commission of any reason why the above applications should not be designated for hearing. Any reply you wish to submit

[ 907]  
[ 1031]

1250

should be filed in triplicate, and under oath, within thirty (30) days of the date of this notice, with a copy served on counsel for the other applicant herein. Upon receipt of any such reply, the Commission will determine whether it can grant your application without a hearing. If it is unable to so find, it will designate your application for a hearing on the issues then obtaining. In the absence of a reply from you concerning the matters discussed above, your application will be subject to dismissal pursuant to the provisions of Section 1.312 of the Rules.

Very truly yours,

Ben F. Waple  
Acting Secretary

cc: McKenna & Wilkinson  
1735 DeSales Street, N.W.  
Washington 6, D. C.

Frank U. Fletcher, Esquire	Mr. Howard T. Head
Spearman and Roberson	A. D. Ring & Associates
Munsey Building	1710 H Street, N.W.
Washington 4, D. C.	Washington 6, D. C.

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[ 908]

[ Rec'd September 19, 1960]

**SPEARMAN AND ROBERSON**  
Attorneys at Law

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September 19, 1960

Mr. Ben F. Waple, Acting Secretary  
Federal Communications Commission  
Washington, D. C.

Dear Mr. Waple:

We are enclosing an original and 14 copies of "Petition to Consolidate Applications for Hearing," filed in behalf of KSTP, Inc.

If any questions arise during your consideration of this matter,  
please communicate directly with this office.

Very truly yours,

SPEARMAN AND ROBERSON

By /s/ Frank U. Fletcher  
Counsel for KSTP, Inc.

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[ 909]

[ Rec'd September 19, 1960]

**PETITION TO CONSOLIDATE APPLICATIONS  
FOR HEARING**

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Comes now KSTP, Inc., licensee of station KOB(AM), Albuquerque, New Mexico, and an applicant for new standard broadcast station in New York City (File No. BP-13932), and respectfully requests the Commission to consolidate the application of KSTP, Inc. for New York City (BP-13922) and the application of American Broadcasting-Paramount Theatres, Inc. for renewal of license of WABC (File No. BR-167) for hearing with the above-styled docket under appropriate issues. In support, it is respectfully set forth:

1. The above-styled docket (No. 6584) represents a long-litigated proceeding which now remains open. <sup>1/</sup> The docket remains open to consider the amended application of KOB (which has now been accepted for filing) to increase nighttime power to 50 kw, and to install a directional antenna system, as recommended by the Commission, to protect a co-channel station WABC operating as a Class I station in New York City. It also was left open to receive an application by WABC to install a directional antenna system to protect KOB as a I-B station -- the invitation to file same having been ignored by WABC. The application of KOB can be granted except for the conflict presented by the WABC application for

renewal of license. The directional antenna proposed by KOB is that specified by paragraph 22 of the Findings of Fact in the Commission's decision in this proceeding adopted September 3, 1958 (16 RR 765) as the directional antenna system which the Commission found therein would represent the best operation by KOB in the public interest.

1/ The Commission's decision herein has been affirmed after a petition for reconsideration (18 RR 822) and after an appeal to the U.S. Court of Appeals (American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission, United States Court of Appeals for the District of Columbia Circuit, Cases No. 15,399 and 15,400, decided May 27, 1960).

[910]

2. The application of American Broadcasting-Paramount Theatres (BR-167) is for renewal of license of Station WABC, New York City, New York, and seeks authority to renew the 50 kw, 770 kc, non-directional operation of WABC, as a Class I-A station. The application was filed "early" by direction of the Commission in its decision of September 3, 1958. The applicant, to date, has ignored, or failed to take advantage of the "leave to file an application for authority to make changes in the operation of Station WABC New York, New York, on 770 kc to specify nighttime operation employing a directional antenna with the parameters specified in Paragraph 22 of the Findings of Fact" granted by the Commission in its decision of September 3, 1958.

3. The application of KSTP, Inc., file No. BP-13932, requests a new standard broadcast station in New York City on 770 kc, 50 kw, U., directional antenna night. It proposes an antenna system which does have the "parameters specified in paragraph 22 of the Findings of Fact" of the Commission's decision of September 3, 1958 for contemplated use by WABC, protecting KOB as a Class I station.

4. It has already been found by the Commission (paragraph 17 of its decision of September 3, 1958) that the directional operation proposed in the amended application of KOB would result in loss of listeners to

WABC, operating non-directionally. This same decision has already noted how seriously and severely the non-directional operation of WABC curtails the nighttime service of KOB. It is apparent therefore that the amended application of KOB and the renewal application of WABC would result in mutual objectionable interference. The applications are therefore in conflict, and must be consolidated for hearing in the same proceeding (Ashbacker Radio Corporation v. Federal Communications Commission 326 U. S. 327, 90 L. Ed. 108 (1945)).

5. The application of KSTP, Inc. for 770 kc in New York City is obviously in conflict with the renewal application of WABC and should also be consolidated for hearing with it in the same proceeding. See Sec. 1.106(a) (2) of F.C.C. Rules and Regulations.

6. The request that the New York City application of KSTP and the renewal of WABC be consolidated with the application of KOB for hearing is not only required by law, as indicated above, but, if effected by adding the New York City applications to the KOB docket, the respective rights of the parties and the interest of the public will be protected by a single Section 307(b) issue. Furthermore, the evidence pertinent to a decision with respect to this issue is already in the Docket No. 6584 hearing record. Since WABC was, and

[ 911 ]

continues to be, a party to the Docket No. 6584 proceeding, the consolidation herein requested will greatly simplify and expedite the disposition of the captioned applications.

7. In order to fully protect the "notification" rights of WABC under Section 309(b), it is suggested that a supplemental McFarland letter be sent to WABC apprising it of the conflict of its application with the application of KOB.



WHEREFORE THE PREMISES CONSIDERED, it is respectfully requested that the Commission (1) consolidate for hearing with the above-styled docket proceeding the applications of WABC for Renewal of License (BR-167) and of KSTP, Inc. for a construction permit for a new standard broadcast station in New York City (BP-13932); (2) specify the following, single issue, for such a consolidated hearing:

"To determine, in the light of Sec. 307(b) of the Communication Act of 1934, as amended, which of the instant proposals would best provide a fair, efficient, and equitable distribution of radio service."

and (3) grant such other and further relief as the Commission deems meet and proper.

Respectfully submitted,  
SPEARMAN AND ROBERSON  
By /s/ Frank U. Fletcher  
Counsel for KSTP, Inc.

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[ Certificate of Service:]

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[Rec'd. August 24, 1961]

LAW OFFICES  
McKENNA & WILKINSON

\* \* \*

\* \* \*

August 24, 1961

Mr. Ben F. Waple  
Acting Secretary  
Federal Communications Commission  
Washington 25, D.C.

Dear Mr. Waple:

On behalf of American Broadcasting-Paramount Theatres, Inc.,  
I hand you herewith an original and fourteen copies of "Petition to  
Clarify or Enlarge Issues" in Docket Nos. 6584 and 14225.

Very truly yours,

Vernon L. Wilkinson

[999]

PETITION TO CLARIFY OR ENLARGE ISSUES

Comes now American Broadcasting-Paramount Theatres, Inc.,  
the above-captioned applicant in Docket No. 14225, and requests the  
Commission to clarify or enlarge the issues set forth in its Memorandum  
Opinion and Order of August 4, 1961 consolidating the above-listed  
applications for hearing. In support whereof, the following is shown:

Background

In its August 4 Memorandum Opinion and Order, giving its reasons  
for the hearing there ordered, the Commission stated (para. 11):

11. Although WABC's pending application requests continuance of its non-directional operation on 770 kilocycles, the Commission's decision of September 3, 1958, concluded, as indicated supra, that the frequency 770 kilocycles would best be utilized by permitting WABC and KOB to operate with 50 kilowatts

[1000]

of power, unlimited time, each employing a directional antenna designed to protect the other. The findings of fact and the conclusions of law reached therein are final and conclusive on the question concerning what type operation on the frequency 770 kilocycles would best effectuate the mandate of Section 307(b) of the Act; See *In re Albuquerque Broadcasting Co.*, 16 RR 895, Para, 12, supra. However, the Commission feels, in view of the language contained in the opinion rendered by the United States Court of Appeals on May 27, 1960, that it would be appropriate at this time to reopen the record in Docket No. 6584 in order to consider any additional evidence to be presented by WABC with respect to its network position on the frequency 770 kilocycles and to determine in the light of such evidence whether the issue is such that it overrides the 307(b) determination previously rendered by the Commission in its decision of September 3, 1958. Therefore, we propose to consolidate WABC's application (File No. BR-167) for renewal of license for hearing with KSTP's amended application (File No. BMP-1738) for Albuquerque, New Mexico, and to reopen the record in that proceeding for such limited purpose, and for that purpose alone. No additional evidence will be permitted to be adduced under issue 1, infra, since, as stated above, our findings of fact and conclusions of law previously reached with respect to Section 307(b) of the Act are final and conclusive. The purpose of including this issue and issue 3 is simply to permit the Commission to take appropriate action upon the above-captioned applications in the light of the additional evidence to be adduced pursuant to issue 2.

The proposed issues on which a consolidated hearing was thus ordered were worded as follows:

1. To determine in view of our findings and conclusions in Docket No. 6584 with respect to KOB's proposal and Section 307(b) of the Communications Act of 1934, as amended, whether

the public interest would be served by a grant of WABC's application (BR-167) for renewal of license for its present facilities, or the application of KSTP, Inc. (BMP-1738) for Albuquerque, New Mexico.

[1001]

2. To determine whether the consideration of providing facilities to the ABC Network in New York on a basis which is fair and equitable in comparison with other radio networks should vary the conclusion with respect to issue 1, above.

3. To determine, in the light of our findings and conclusions in Docket No. 6584 and the evidence adduced pursuant to issue 2 above, which of the above-captioned and described applications should be granted.

The aforesaid issues were duly published in the Federal Register on August 9, 1961 (29 F.R. 7263) and a prehearing conference has been scheduled for September 7, 1961. In the meantime, KSTP, Inc., whose application for WABC's facilities in New York (BP-13932) was ordered held in abeyance pending the outcome of the above-captioned hearing, has petitioned the United States Circuit Court of Appeals for review of the Commission's Memorandum Opinion and Order of August 4, 1961.

Although ABC believes that it would be more orderly procedure to have the scope of the issues initially determined by the Examiner at the prehearing conference, with an appeal therefrom to this Commission in the event of any disagreement thereon, ABC is confronted with a rule of the Commission requiring parties to request clarification or enlargement of the issues within 15 days after their publication in the Federal Register (Rule 1.141). Similarly, rather than proceed under published instructions to the staff in Docket 6741, bearing on the issue whether the treatment accorded ABC in Docket 6584 is "fair and equitable" versus that (to be) accorded

[1002]

the other radio networks in Docket 6741, ABC would prefer to have available to it the actual decision in Docket 6741. However, since the instructions are out, a failure to request clarification or enlargement because the actual decision has not yet been released, might be held not to constitute "good cause" for filing such a petition at a later date. For these reasons ABC is submitting, within the 15 day period required by Rule 1.141 rather than after the prehearing conference and after the release of a decision in Docket 6741, the instant petition for clarification or enlargement of the issues.

ABC's Position

It seems apparent from paragraph 11 of the August 4 Memorandum Opinion that the instant hearing is being ordered, in line with commitments contained in the September 3, 1958 decision of the Commission (16 RR 895) and to correct certain deficiencies in the record in Docket 6584 which the Court of Appeals noted in its May 27, 1960 decision in American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission, 108 U.S. App. D.C. 83, 280 F.2d 631, when it said (pp. 87-88):

At the same time, we do not think that the position of ABC as a network should be permanently prejudiced by forcing it to share a channel if other networks are given full use of clear channels. This inequity, if it exists or is permitted to exist, should be cognizable by the Commission in a proper proceeding brought before it by ABC, even though the assignment of KOB to 770 kc is permitted to continue. In other words, the Commission should

[1003]

seek to provide channel facilities to the ABC network on a basis which is fair and equitable in comparison with other networks. Whether this is to be done by permitting ABC to intervene in the



clear channel proceedings now pending, or through some other means, is not for us to say. It may be that ABC can raise its claims in this regard by filing competitive applications when present licensees on other frequencies seek renewal or by seeking modification of existing licenses held by others. Perhaps the Commission will afford, sua sponte, some other procedural remedy. Thus, we do not believe that ABC has been or should be precluded from a hearing on its claim that the public interest requires that the loss of service in the East, which Class I broadcasting from Albuquerque produces, be absorbed by some eastern broadcaster other than WABC. Any failure by the Commission to give due consideration to ABC's claims for treatment comparable to that accorded to other networks, when raised in an appropriate manner, may be brought to the courts for review.

To appreciate the full significance of the language thus used by the Court, it must be borne in mind that ABC, in connection with its claim of disparate treatment, had pointed up the fact in its brief that the Commission, although proposing in its Third Notice in Docket No. 6741 to break down all 24 Class I-A channels, was requiring the Class II stations which were to be placed thereon to protect the dominant stations to their present 0.5 mv/m 50% of the time skywave contours (except 770 kc). In other words, unlike the other networks and occupants of I-A channels, ABC was being required to directionalize (necessitating a new site to protect KOB), whereas NBC and CBS and the occupant on 1180 kc were being permitted to continue their non-directional operation, with any new station on these channels protecting the secondary skywave

[1004]

of the dominant stations. This, it was asserted, was not "fair and equitable" treatment.

ABC further pointed out that the Commission had originally refused to consider other channels (such as 660 kc, 880 kc, and 1180 kc) in Docket 6584 on the theory that these matters would be ultimately looked into and resolved in Docket 6741, but that the Commission in its Second and Third Further Notices in Docket 6741 had categorically stated that 770 kc was no longer being there considered, thereby precluding ABC from showing in either Docket 6741 or 6584 that a breakdown of certain other frequencies would better serve the public interest (particularly frequencies utilized by NBC and CBS -- with other NBC and CBS owned and affiliated stations providing a plethora of skywave service east of the Mississippi whereas ABC was largely dependent on WABC and WLS). The Court's discussion of other frequencies and its suggestion of sua sponte action of the Commission allowing ABC to present those matters, by reopening the record in Docket 6741 or in some other proceeding, must be read in the light of the foregoing contentions in ABC's brief.

ABC further emphasized the fact in its brief that the Commission had originally promised ABC a show cause hearing (after the preliminary engineering determination in Docket 6584), that no final "grants" had been made in Docket 6584 (necessitating a 402(a) rather than 402(b) review), and that

[1005]

the Commission had retained jurisdiction in Docket 6584 pending the submission of applications which ABC and KOB were there directed to file. The Court' sua sponte language and other suggestions above quoted, with the caveat about subsequent court review, must be read in the light of those arguments and in the light of the Court's concluding paragraph (p. 88):

For these reasons, and on the basis stated, we affirm the Commission's order. We need not and do not pass on any contentions of the parties not here discussed.

Accordingly, it is ABC's view that Issues 1, 2 and 3, when read in the light of paragraph 11 of the August 4, 1961 Memorandum Opinion and Order, the Court's decision of May 27, 1960, and the contentions to which the Court was there addressing itself, contemplate the introduction, inter alia, of evidence on the following matters:

A. On whether the public interest would be better served if KOB were placed on 660 kc, 770 kc, 880 kc or 1180 kc (the frequency on which it was operating and on which it had a 50 kw c.p. at the time it was shifted to 1030 kc to accommodate NARBA). Pertinent thereunder would be engineering data comparing coverage, white area, etc., on each of those four frequencies; data on the number of owned and affiliated stations available to NBC, CBS, and ABC in the area east of the Mississippi in the event KOB operated as a Class I-B on those particular frequencies, etc. Absent such data it cannot be determined whether

[1006]

the treatment being accorded ABC is or is not "fair and equitable" vis-a-vis NBC<sup>1</sup> and CBS.<sup>1/</sup>

B. On whether disparate treatment is being accorded ABC, if a Class I-B station is placed on 770 kc, and not on the other Class I-A channels, and more particularly on Channels 660 kc and 880 kc licensed to NBC and CBS in New York, and on 1180 kc licensed to WHAM in Rochester.

C. On whether disparate treatment is being accorded ABC, if its frequency is broken down for a Class I-B operation and if ABC is required to directionalize and protect KOB (necessitating a site change), in view of the Commission's announced determination to place only Class II operations (which must protect the dominant station's skywave signal) on 660 kc, 880 kc and 1180 kc.

D. On whether the public interest would be better served if 770 kc were broken down in the same fashion as the

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1/ Somewhere along the line, as the Court has made clear, the Commission is duty bound to consider and compare frequencies other than 770 kc. In its Second and Third Notices in Docket 6741, the Commission stated in no uncertain fashion that the matter of 770 kc was not being considered in that proceeding. In reliance thereon ABC refrained from filing comments and countersuggestions in that proceeding regarding the use of 770 kc. The only Class I-A frequency ever considered and "put on the line" in Docket 6584 was 770 kc, on which the Court is on record that KOB has no greater claim than it has on any other particular channel. American Broadcasting Co. v. FCC, 89 U.S. App. D.C. 298, 191 F.2d 492 (1951). Singling out 770 kc licensed to ABC and ignoring equally available frequencies licensed to NBC and CBS is disparate treatment.

[1007]

Commission proposes to break down 660 kc, 880 kc, and 1180 kc, and if so on what frequency KOB should be required to operate.

Unless the Commission agrees that the issues as presently worded are broad enough to encompass the foregoing matters, their enlargement to permit the introduction of such evidence is herewith requested.

Respectfully submitted,

AMERICAN BROADCASTING-PARAMOUNT  
THEATRES, INC. (WABC)

By Mortimer Weinbach  
\* \* \*

James A. McKenna, Jr.  
Vernon L. Wilkinson  
\* \* \*

Its Attorneys

August 24, 1961

[Certificate of Service]

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## EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

## BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C.

January 15, 1962

In the Matter of:

KSTP, Inc:

Albuquerque, New Mexico

Call Letters: KOB

Application for modification of a  
 construction permit;  
 frequency requested,  
 770 kc; power requested,  
 50 kw; DA-N Unlimited.

- - -

American Broadcasting-Paramount

Theatres, Inc.

New York, New York

Call Letters: WABC

Renewal of License.

DOCKET NO. 6584

DOCKET NO. 14225

The above-entitled matter came on for hearing before Asher H.  
 Ende (The Presiding Examiner), in Room 1420, New Port Office  
 Building, Washington, D. C. at 10:00 o'clock a.m.

## APPEARANCES:

(As heretofore noted.)

\* \* \* \* \*

MR. WILKINSON: I do have for the record, Mr. Examiner, a few preliminary matters in addition. This is the first opportunity since the Commission ruled upon our motion to consider other frequencies and for the record, with no expectation of any additional or different ruling by the Examiner, of course, but just for the record, I am preserving our exception to the Commission's refusal to permit us to consider and compare other frequencies that might be utilized by KOB other than 770.

[Tr. 35]

I would also like to preserve for the record certain other exceptions, interlocutory, made along the way. You will recall at the time the Commission issued its decision from which the appeal was last taken, its decision of September 3, released September of 58, the Commission modified rule 3.25 to permit another station to be placed on that channel in New Mexico, and further ordered in its further ordering clauses, stated, that Albuquerque was granted leave to amend its application BMP 1738 to specify nighttime operation of station KOB on 770 with power of 50 kilowatts, employing a directional antenna with the parameter specified in paragraph 22 of the findings.

You will recall that BMP 1738 was an application to modify a 50 kilowatt construction permit which KOB originally had on 1180 kc. When they filed their application 44 for 770 kc they requested 50 kw non-directional. And as a consequence this ordering clause permitted them to provide a directional pattern with 50 kw on 770 within the parameters of paragraph 22 of the findings. The ordering clause further granted leave to KOB to directionalize its New York operation on station WABC and conform to parameters likewise specified in paragraph 22, both these orders being permissive. But, then directed American Broadcasting Company to file its renewal one year ahead of time. That renewal was subsequently filed after an extension, under objection, without specifying a directional pattern.

Then the Commission's decision of September 3, 1958, went

[Tr. 36]

on in paragraph 57 stating that these proceedings are to remain open for the purpose of considering further adjudicatory matters as may be based upon the orders herein directed to station KOB and WABC.

Mr. Examiner, I mention these preliminaries because as a result our appeal to the Court of Appeals was under section 402A, the Judicial Review Act of 1950. While a protective appeal was taken under 402B, the matter was considered under 402A. And the Court



in the last line of its decision says in its decision of May 27, 1960, 108 US at BC 83, "we need not and do not pass on any contentions the parties not here discussed."

As a consequence WABC continues to reserve the points raised in its brief before the Court of Appeals in their rule-making proceeding in case Nos. 15399 and 15400 to the extent that they were not discussed or decided by the court in its May 27, 1960 decision.

\* \* \* \* \*

[Tr. 79]

MR. WILKINSON: Mr. Examiner, on the so-called figures and tabulations attached thereto through page 30, we have shown, first of all, that by requiring WABC to directionalize at a time when the Class I-A's owned and owned and operated by any other network shall not be required to directionalize, we are losing in excess of seventeen million people within our secondary service area, and in excess of seven hundred thousand people within our primary service area.

These exhibits further show that of the seventeen million-plus that we lose within our secondary service area by being required to directionalize, in excess of five million six hundred thousand of those people have no primary service at night -- white area -- meaning, therefore, that they are entirely dependent upon secondary intermittent sky wave service for a radio service of any kind at night.

These are the consequences of requiring us to directionalize.

Now, if, by chance, in compelling us to directionalize, it would mean that somebody else magically could cover the

[Tr. 80]

whole western half of the United States from the Mississippi River west and provide primary service out there by causing us to suffer this, that might be one consequence.

On the other hand, if ABC is required to suffer these losses and it means that KOB will only thereby gain one person, another consequence might develop.

Now, the figure is somewhere in between.

Therefore, to complete the picture of what the consequence is on the basis of the 1960 census and as far as the census figures are concerned, the consequence is to us that WABC is required to lose in excess of seventeen million-- 5, 600-plus thousand, which have no primary service at night, and then to lose seventeen million in our primary service area, areas which have little secondary or other primary service by stations which are owned by ABC, contrasted with what we say are a substantially greater number of stations affiliated with the other two networks.

It becomes material, therefore, to know to what extent, by giving what I would call favored treatment to KOB in New Mexico over what is being given to the other twelve Class II-A's as involved in the clear channel proceeding, has some relevance.

Therefore, our next service of three or four figures should show -- the first one, figure 19, page 31 -- would show what KOB would cover at night -- this is only a night

[Tr. 81]

time problem, all the way through -- would cover at night if they directionalized and operated as a Class II-A like the twelve other Class II-A's provided for in Docket 6741, the so-called Clear Channel Proceeding.

That is predicated upon Plate 13-A introduced by KOB's engineer in the last proceeding, Mr. George Davis, the only difference being that it is now brought up to date populationwise with the '60 census intervening and taking cognizance of any grants within the area since the last record was compiled in 1958.

Now, the next figure, 20, page 33, shows on the inner circle the area which KOB would cover, operating on 770, directionalized to protect our 0.5, fifty per cent sky wave, like the other stations are required to protect CBS' and NBC's fifty percent sky wave contour, or Mutual's, as against what they will cover if we directionalize and then

they fit in a directional pattern with parameters pursuant to finding 22. And following that is a tabulation of what they gain.

They gain 170,000 people, 67,000 of whom have no primary service at night.

Contrast that with our seventeen million-plus and our five million six hundred thousand-plus that have no primary service at night, and if Mr. Fletcher is thinking in terms of the supplemental exhibits, they are yet to come on the very next item.

[ Tr. 82]

We also show on those that KOB is affiliated with NBC and that NBC has five or six affiliates that provide primary service -- secondary service to the area between these two circles on figure 20, between what they would gain operating as a Class II-A, not requiring us to directionalize, and if they require us to directionalize and then cause this loss of seventeen million and a half, and so on.

I therefore think this is pertinent, Mr. Examiner, in connection with the impact that it is going to have upon us, the gains from the public interest standpoint, because that is Issue 2 and 3, and I think therefore highly material to this proceeding.

Obviously, as I said at the beginning, if KOB only gained one person, I don't think any commission or any agency or any court would say that these losses that we show up through page 31 should be tolerated.

Conversely, if they provided the due primary service to the whole eastern half of the United States, a lot of area that doesn't have primary, I suppose we would even concede that that would be in the public interest.

What they do is somewhere in between and what that in between figure is, I think you, as the examiner, should be allowed to do, and I think the commission, when it comes to its final decision here, should have those figures before them.

\* \* \* \* \*

[Tr. 86]

PRESIDING EXAMINER: I am afraid we can't agree with you, Mr. Wilkinson, because the Commission has stated that no issue -- no evidence may be taken on Issue 1, since . . . "as stated above, our findings of fact and conclusions of law previously reached with respect to Section 307 (b) of the Act are final and conclusive."

That is that sentence.

Then, in order to make sure that the Examiner doesn't misunderstand, the Commission explains in very simple language again, "The purpose of including this issue and Issue 3" -- that is, Issue 1 and Issue 3 -- "is simply to permit the Commission to take appropriate action upon the above-captioned applications in the light of the additional evidence to be adduced pursuant to Issue 2."

Under those circumstances, it would appear to me that I am precluded from looking at anything with respect to KOB at all and would be precluded from varying or from refusing to vary the Commission's decision if you prove a case under Issue 2, because I believe, somehow or other, that the benefits to be gained from the more extensive operation of KOB outweigh your

[Tr. 87]

competitive disadvantages.

The only problem that I have here now is to consider whether providing facilities to the ABC network on a basis which is fair and equitable in comparison with other networks can vary the conclusion in Issue 1, above.

\* \* \* \* \*

[Tr. 113]

FRANK G. KEAR

was called as a witness and, having first been duly sworn, was examined and testified as follows:

## DIRECT EXAMINATION

PRESIDING EXAMINER: State your name and address for the record, please.

THE WITNESS: My name is Frank G. Kear. I reside at 3913 Leland Street, Chevy Chase, Maryland, with offices at 1302 - 18th Street, Northwest, Washington, D. C.

MR. WILKINSON: I propose to offer this witness as a propagation expert and one who is familiar with the communications engineering standards. Will his qualifications be conceded, or need I go into detail?

MR. FLETCHER: His qualifications are conceded.

[Tr. 114]

PRESIDING EXAMINER: Mr. Nash?

MR. NASH: We concede his qualifications.

PRESIDING EXAMINER: Qualifications conceded. Proceed.

BY MR. WILKINSON:

Q. Do you have a copy before you of what has been received in evidence as WABC Exhibit 101 in substantial part? A. I do.

Q. Directing your attention to Figure 4, page 15, which indicates that a certain portion of that area received no service from an O & O station or an affiliated station other than WABC, and portions received from one other station only by ABC, namely, WLS, and the remaining portion received also service from KNEL, do the Commission's rules refer to secondary skywave service as intermittent service?

MR. FLETCHER: Mr. Examiner, I object to the question. The rules speak for themselves.

MR. WILKINSON: This is a foundation question, Mr. Examiner.

PRESIDING EXAMINER: I think that should be allowed. He can state that rule so forth and so on does, and that he knows that the rules do say so. He is an expert.

THE WITNESS: By definition the secondary service as shown on Figure 4, for example, is expressed as 50 per cent of the time. That is a very complicated way of expressing what goes on. It means that for 50 per cent of the time during a certain period the signal will exceed a certain value previously

[Tr. 115]

specified. The signal varies constantly. Sometimes it is greater, sometimes less. And the contribution is approximated, but does not follow any mathematical expression. So the service at such times as it may be substantially below the field indicated hereon would not be service, at such times as it is substantially above it would be rather better service than you might expect. In other words, the service does vary from minute to minute and hour to hour and day to day.

Q. And season to season? A. And season to season, and sunspot cycle to sunspot cycle.

Q. And Aurora Borealis and a few other details, is that correct? A. That is correct.

Q. Does that mean, therefore, that if a given area receives only one skywave service, 0.5 50 per cent of the time, and had no primary service at all, that whenever that is below this 50 per cent there would be an inadequate service, even an inadequate secondary service provided to this area, in other words, no radio service under the Commission's standards, whereas if it were greater there would be service, is that correct?

MR. FLETCHER: I object to that question. It is highly leading if it is not misleading in nature. It does not call for an expert opinion. It presumes a state of facts which has

[Tr. 116]

not been shown to have any relationship to the Exhibit material that has been offered. And I see no relevance to it whatsoever.



[Tr. 117]

MR. WILKINSON: Mr. Examiner, what I am leading up to is the fact that the next two or three figures for CBS-NBC here show eight or nine potential sources of the NBC and CBS programming to this 5,680,000 that have no primary service east of the Mississippi, whereas they are dependent upon only one or two stations at the most by which could be made available to them the ABC radio network. And I want to ask this man, who is an expert in this field of propagation, and so on, if an area is limited to only one or two sky wave services, a substantial number of this so-called flight area, 5,680,000, at certain times of the year may be without any source of ABC network programs.

PRESIDING EXAMINER: I think I can sustain the objection as to form. I think it is leading in nature. This man has been qualified as an expert, and has had his qualifications conceded. I believe you can show him page 15 and ask him what conclusions he would reach on the basis of what this map shows with respect to the ability of the people there receiving service from ABC or stations affiliated with it, and let him go and give his answers rather than suggesting what they might be.

MR. WILKINSON:

Q. Dr. Kear, would you like to adopt the Examiner's question and call your attention to the white areas in here which we are primarily interested in that have no primary service, and ask you to expound on the question as propounded by the Examiner.

[Tr. 118]

A. Let us consider to begin with just one line on the chart. The upper right-hand corner is labeled as WABC 0.5 mv/m 50 per cent DA which is a lot of words to define a line. But that represents the boundary of a field established by radio station WABC. And the field along that line, well, it measured over a long enough period of time, exceed one-half millivolt per meter for 50 per cent of the time. There, the Commission has defined a field of that magnitude exceeded the 50 per cent of the time of service, secondary service. It is intermittent service as

we discussed before. But on the Commission's definition it is service from there back towards the station, even though it does go below the 0.5 minimal per meter value from time to time.

Now, obviously, since it is a field that varies, when it drops below, substantially below 0.5 down to 0.1, in such areas the reception will be significantly poor, and there are, of course, times, depending upon the condition of skywave propagation, whether it will fall to values lower than that. So that when we have an area with the figure 1 in it such as we have close to New York City on the right-hand side of the differential area, there would be substantial periods of time where the signal is too old to provide satisfactory service. The station located at another spot may be 1 wave length away or maybe 1,000 miles away would pass its signals to different portions of the ionosphere which may or may not be in the same state of ionization. For example,

[Tr. 119]

KXEL, located out in Iowa, is a long way from New York, and there is a very good chance that at a time when conditions are bad for propagation from New York City they might not be as bad from Waterloo, Iowa, or likewise, since we have covered the area from WLS, the propagation conditions from Chicago to the South might be substantially better than they are from Waterloo to the South or New York to the South. So as we increase the number of stations that produce service as defined by the Commission and as shown geographically on this map, as we increase the number of stations that establish these services, then the probability of providing continuous service improves, and the more stations that are there and serving a given area, they gather the probability that a service signal will be present on one of the channels at any given time. This, of course, does not take into account the fact that there are times when there is no ionospheric propagation whatever. But those periods are only of fairly short duration usually. So they gave you the number of stations geographically separated, preferably, that serve an area, the greater the likelihood of continuous coverage.

\* \* \* \* \*

[ Tr. 138]

Washington, D. C.  
January 16, 1962

\* \* \* \* \*

[ Tr. 139]

HAROLD L. NEAL

was called as a witness, and having been first duly sworn, was examined and testified as follows:

\* \* \* \* \*

**DIRECT EXAMINATION**

BY MR. WILKINSON:

\* \* \* \* \*

[ Tr. 140]

(THE DOCUMENT REFERRED TO WAS MARKED FOR IDENTIFICATION AS WABC EXHIBIT NO. 104.)

BY MR. WILKINSON:

Q. Mr. Neal, was this document prepared by and under your supervision and direction? A. It was.

Q. Is it company policy to require to be submitted monthly statements to the key operating personnel, reports on the program activities of WABC?

[ Tr. 141]

A. Yes, sir.

Q. Is this predicated, this report predicated upon the logs of Station WABC? A. It is.

Q. Is the information contained therein true and correct to the best of your information and belief? A. It is.

MR. FLETCHER: May I interrupt just a moment?

Mr. Reporter, will you be kind enough to go back to that question about company policy and read that back to me, please?

(The reporter read from his notes as requested.)

BY MR. WILKINSON:

Q. This report is a compilation to some degree of those such reports, Mr. Neal? A. Yes, it is.

Q. And what period does it correspond? A. January 1960 through October 31, 1961, I believe.

Q. Now, Mr. Neal, what does this document purport to show, very briefly? The document, we will be told, speaks for itself. But what does it purport to show? A. An indication of the extent and stature of the WABC news operation both local and network, and that we carry all network news programs; the stature and extent of public affairs and public service, religious and educational broadcasts that have been on the station during this period of time; the

[Tr. 142]

highlights of the news department, the number of persons, the size, the quality, the obvious expenses involved in the various offices throughout the country, our foreign bureaus, and the number of foreign correspondents, all of which makes for a large, expensive and quality news gathering organization. The programming breaks down into the regular news categories, the regular -- and by regular I mean regularly scheduled public affairs programs in the field of religion, covering Christian in Action for the Catholic faith, Message of Israel for the Hebrew Faith, Pilgrimage for the Protestant faith, in addition to locally produced programs for each of the major faiths.

Negro College Choirs, a network produced program carried by the station.

Q. Is that one Negro college choir? A. No, that is many Negro college choirs, the program being produced by our network staff.

Regularly scheduled programs such as Adlai Stevenson's Report, Issues and Answers; all network produced programs carried by the station in the public interest.

In addition to this, there are, of course, specially timed programs carried throughout the year as events occur that warrant their programm-

ing. These cover a wide variety of subjects from the Nixon-Kennedy Debates, Inaugural Parade, Space Shots, the President in Europe, United Nations Reports, Pope John's Easter Message -- this is just touching a few points

[Tr. 143]

which show the diversity and extent of the public affairs or public interest programming carried by the radio station.

Q. Did news reporters of WABC accompany the President on his trip to Europe and South America recently? A. Yes. And they also cover New York and Chicago with famous and well-recognized reporters and news analysts who work under the network of the radio station as well.

This is the general intent of the document, to show the scope of the station's and the network's activities in these areas.

\* \* \* \* \*

[Tr. 218]

[PRESIDING EXAMINER:] \* \* \*

It appears to me under these circumstances that the Commission, and before it the Court, was not concerned under these circumstances with the quality of the programming of ABC, that I would assume it took for granted, but with the provision of a means to ABC or the physical facilities to serve an area comparable to that which the other networks can serve on a clear channel basis. And under those circumstances it would appear to me that the evidence offered in Exhibit 104 is not relevant to the issue here, nor is it in any way competent to result in a decision one way or the other. I would not or could not under the issue as it is now written evaluate and say that this is good or bad, that these services are the kind that I or the Commission would like. I think in the Court's language that has been taken for granted, and that the scope and ambit of what is to be shown here is the effect on ABC of not being able to have facilities on a basis which is fair and equitable in com-

parison with others other other than the quality of the programming which they transmit.

I, therefore, sustain the objection to Exhibit 104. I assume that an exception is noted. And if Mr. Wilkinson desires to have this again as an offer of proof, that will be permitted.

\* \* \* \* \*

[Tr. 224]

WILLIAM RAFAEL

was called as a witness, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

\* \* \* \* \*

[Tr. 229]

THE WITNESS: At the present time, our concept of network operation is, unlike previous experience before television became as strong as it is, that radio in a very real sense is no longer a theatrical medium it is a personal and service medium. People do not turn to radio for the kind of dramatic presentation that they used to. The variety programs in the main have gone, with few exceptions, to television.

Our attraction, we feel, and our responsibility is to provide as broad a service on all possible types of information to the American people. This is what makes us attractive to our affiliates, this is what makes us attractive to our audience.

BY MR. WILKINSON:

Q. And to your sponsors? A. And to our sponsors. We are in the business of creating the best possible news service, the greatest selection of commentators, information on every possible subject of

[Tr. 230]

interest to the American people, from fashion to diet. We feel that in so doing it is possible for us to maintain a position in the broadcasting



business that cannot be provided by local stations by themselves. And this is our concept of the present scope of the American Broadcasting Company Radio Network.

Q. Mr. Rafael, what have you done, we will say, in the field of news, to that end? A. In order to make our news distinctive, of course under Mr. Haggerty, who is at the present time director of news both for radio and television for the American Broadcasting Company, we have recently appointed a radio only news editor, so that our news will not in any way be influenced by the considerations of the picture, that will be audio news and radio news insofar as we can make it that.

We also believe that the basis of network news is not so-called "Rip and reading", taking stuff off the wire service, but that it is important for us to go places and let listeners hear things as they happen. We have increased the number of actualities in our news, by "actualities" I mean actual on the scene reports, until at the moment we are averaging around 220 such reports in our newscasts each week. These reports come in from our foreign correspondents, from our affiliated stations, from our O and O's, from our Washington reporters, et cetera.

[Tr. 231]

We have also provided a full schedule of news from 7:55 in the morning until 11:55 at night, five minutes each hour on the hour, as well as a news bloc in the evening of news and commentary.

MR. NASH: Mr. Examiner, in the light of your ruling on the exhibit, and the basis upon which that ruling was made, I think that the question and the answer given thereto are in themselves not relevant to the proceeding.

PRESIDING EXAMINER: Are you going to tie those in, Mr. Wilkinson?

MR. WILKINSON: I believe I will, Mr. Examiner, I am certainly endeavoring to in what I consider to be the scope of your ruling and in what I consider to be the scope of Issue 2.

PRESIDING EXAMINER: If this is a motion to strike, I will defer the ruling, subject to tying it in.

BY MR. WILKINSON:

Q. In the interest of saving time, you have seen a copy of what was marked for identification and rejected as WABC Exhibit 104. Is the list of news correspondents on pages 2, 3, and 4 of that document true and correct to the best of your knowledge and belief? A. Yes, it is.

MR. FLETCHER: You have got a recent addition, haven't you?

THE WITNESS: Which one? We have a recent addition almost every

[Tr. 232]

day these days.

BY MR. WILKINSON:

Q. Now, besides your regularly scheduled newscasts, what do you do in the way of special events and other matters? A. In addition to our regular newscasters and our commentators, we endeavor to provide coverage in depth of material of special interest to our listeners. For example, when Kennedy went to Europe we sent with him a radio only crew to cover that European trip, and we provided specialists in evening hours in order to report on the events surrounding the Kennedy trip.

When the American Medical Association had its meeting in New York we provided a special on the latest medical discoveries for our listeners.

We try, whenever we feel that an event warrants it, to background an event before the event for our listeners in the evening time. For example, at the time of the last man shot we provided a descriptive program of the evening before, giving the history and background of man's space flight.

We also, I may add, cover at length and in detail any outstanding events. For example, on the 23rd, provided everything goes off on schedule, we will be on the air for six hours covering the man shot.

Q. What other kind of service do you provide to your affiliates other than news and special events on the ABC Radio

[Tr. 233]

Network, through the ABC Radio Network? A. Obviously, because of the expense incurred in a news operation you can never, as has been demonstrated by many attempts to do it, you can never break even with just a news service. We have got to augment our news and public affairs with other programs. At the moment we have two major programs outside of the sphere of news and public affairs. One of them is the Breakfast Club, Don McNeil Breakfast Club, which has been on the air for 29 years. And the other is a new program called Flair, which has now been on the air for approximately a year and a-half. This program consists of service features as well as entertainment features. We do material on -- advice to investors on health, on physical fitness, on food, on cooking, et cetera.

Q. How many stations are presently affiliated with the ABC Radio Network? A. I think as of the time I left New York it was 397.

Q. Has that number been increasing, we will say, over the last year? A. It has, yes, both in quality of stations and number of stations.

Q. And are you in your position with the ABC Radio Network familiar with whether your affiliates carry a small percentage, a substantial number or a large percentage of programs

[Tr. 234]

provided by the ABC Radio Network.

MR. FLETCHER: Would you read that question back, please?

(The question, as recorded, was read by the reporter.)

THE WITNESS: If a station does not carry a large percentage --

PRESIDING EXAMINER: The answer to that is yes or no?

THE WITNESS: The answer is yes.

BY MR. WILKINSON:

Q. And are they under contracts to official segments of time in various sections of the day to the network? A. Yes, the network does have option time. Actually, the network asks in its contracts that the station is clear certain programs, the Breakfast Club, et cetera. I don't know the legal details of this as far as affiliation is concerned.

Q. You have indicated that the number of stations is growing, and has now reached the point of 397. Have you noticed any improvements with your clearance? A. Yes, I have.

Q. And in what respects, improved?

MR. FLETCHER: Just a moment.

Your answers are falling on top of his questions, which I don't understand in the first instance.

THE WITNESS: I am very sorry.

MR. FLETCHER: So if you would give me time to follow this

[Tr. 235]

I would appreciate this very much.

Would you read the preceding question, please?

(The question, as recorded, was read by the reporter.)

BY MR. WILKINSON:

Q. In what respects were they improved? A. The average station on our line-up is clearing more programming for the network than it ever has in our recent history, to my knowledge.

Q. And are you getting requests for affiliations with the network? A. Yes, we are.

Q. Is it your understanding that ABC has a larger number of stations affiliated with the network than CBS or ABC or NBC? A. Yes.

Q. Do you have a number of stations which are daytime only stations that are affiliated with the ABC Network? A. Yes, we do, but I am afraid I wouldn't be able to give you an exact breakdown on that.

Q. Do you attempt to provide a daytime service to these stations as well as a nighttime service, to these affiliates? A. Yes, as well as our commercial programming and our news and public affairs programming, we provide as much service as possible in order to assist the small station, to

[Tr. 236]

assist station in various markets that don't have facilities for local programming that larger stations have, we try to keep on the air all day in order to help these stations, and in out of service periods we try to program responsible programming that will be acceptable to our smaller stations.

Q. And under your service theory do you devise some programs which you do not expect the entire network to take, a specialized type of program? A. Yes, we do.

Q. Give us an illustration or two? A. Well, for example, a few weeks ago we did a memorial program for Carlos Salzedo, who is the greatest living harpist who died recently. The program was of a nature that we knew that no stations but so-called good music stations would accept and use the program, it wouldn't fit into other formats.

Q. Approximately what percentage of the ABC Radio Network programs are carried by WABC, either on live time or on a delayed basis?

MR. FLETCHER: Mr. Examiner, I am going to object to that question unless the foundation for this witness' knowledge of those facts is given.

MR. WILKINSON: I think he could answer that. He is in this position.

MR. FLETCHER: You didn't ask him if he knew, you asked him

[Tr. 237]

what the answer is.

MR. WILKINSON: If he doesn't know, he can answer it.

PRESIDING EXAMINER: Perhaps we can go at it two ways, what percentages are, and how do you know. And if the witness doesn't answer it satisfactorily, I will entertain your motion.

THE WITNESS: How do you want me to go about this.

BY MR. WILKINSON:

Q. What percentage of the programs produced by the ABC Radio Network are carried by Station WABC in New York either at live time or on a delayed basis, and how do you know? A. With the exception of our sustaining musical programs, approximately 80 percent of these programs are carried by WABC. My knowledge of this is because I see WABC logs, I worked exactly two floors above Mr. Neal, WABC and the radio networks are located in the same building, and we have interlocking personnel in many respects.

Q. What percentage of the WABC programs, network programs supplied these 397 stations or offered to these 397 stations originate out of New York, or ABC's facilities in New York? A. You want a percentage figure?

Q. Approximately, ten percent, fifty percent, ninety percent, or whatever your estimate would be, and why?

MR. FLETCHER: I think you talked first about WABC

[Tr. 238]

programs. If I understand your question to relate solely to ABC network programs --

MR. WILKINSON: That is correct.

MR. FLETCHER: I am along with you.

BY MR. WILKINSON:

Q. If there is any doubt, I will try to rephrase it.

What percentage of the ABC radio network programs that are provided to your ABC radio affiliates originate out of New York?

A. Approximately 80 percent, I would say, perhaps a little higher, but I wouldn't want to say that.



Q. Mentioning the Breakfast Club, which does originate in one sense out of Chicago, how is it fed to the radio network? A. Well, if you mean what percentage -- outside of actual production, as far as feeding the network is concerned, over 90 percent of all our programs originate as feeds in New York, yes.

Q. And 80 percent are acutally produced in New York, is that correct? A. That is right.

MR. FLETCHER: His previous answer was 80 percent outside.

THE WITNESS: No, I am sorry.

MR. FLETCHER: You didn't intend to say 80 percent outside?

THE WITNESS: No, I didn't.

[Tr. 239]

BY MR. WILKINSON:

Q. Eighty percent in New York? A. That is right.

Q. Now, in your capacity, programming capacity with the ABC Radio Network coordinator, do you operate under a general budget?  
A. Yes, I do.

Q. What is your understanding as to whether ABC radio network has or has not been operating in the black or the red during the period that you have been familiar with it?

MR. FLETCHER: Mr. Examiner, certainly we are not going to take any testimony of this type to establish "black" or "red" figures -- we object to the question being completely outside the scope of the knowledge of this witness, and even if the comptroller was on the stand I wouldn't take his conclusion with respect to it, I think the figures are available, and they are the only evidence that would be reasonable and pertinent in connection with getting such a conclusion in the record.

MR. WILKINSON: Let me rephrase the question this way:

BY MR. WILKINSON:

Q. Have the reports filed with the FCC, published in the annual reports to the directors of American Broadcasting-Paramount Theaters,

Inc., indicated that the ABC Radio Network was operating at a loss?

A. Unfortunately, yes.

[Tr. 240]

MR. FLETCHER: Same objection.

PRESIDING EXAMINER: I think that it would be appropriate to bring the document and let him read from it and get it in the record that way, then the figures would be there.

MR. WILKINSON: The figures, however, are not shown in that document.

BY MR. WILKINSON:

Q. Is that not correct? A. In the annual report?

Q. Merely the statement that I had reference to. A. The statement is made.

MR. WILKINSON: Mr. Examiner, we are in this spot. This is a very highly competitive business. The information supplied to this Commission under Form 324 we are perfectly willing to let Broadcast Bureau Counsel take a look at. But we are not willing to have flashed upon this record for the benefit of two particular competing networks precisely what we are losing.

\* \* \* \* \*

[Tr. 265]

CROSS EXAMINATION

BY MR. FLETCHER:

\* \* \* \* \*

[Tr. 268]

Q. Can you tell me what type of programming is done by the ABC radio network that is not done by one or more of the other radio networks? A. Yes. Of course there are all sorts of program categories. If you want me to go through a schedule, I could say that -- well, let me give you examples of the kind of thing we do.

Q. That you have already done. I directed my question to the types of program. A. This is so generic that radio programming, you know, is --

MR. WILKINSON: I think he could answer.

PRESIDING EXAMINER: Just a moment, please. The question is types you do that others don't do.

Were you planning to give examples of the types you do that others don't do?

THE WITNESS: That is exactly it.

PRESIDING EXAMINER: I considered that it was.

Let him proceed, Mr. Fletcher.

[Tr. 269]

THE WITNESS: For example, we have a service -- our program, Flair, as a weekday program, is not duplicated by any other radio network.

When you look at our coverage lists of special events, we have many special events that are not covered by other networks.

For example, at our year-end roundup, this year, neither NBC nor CBS did a radio-only news roundup of the year-end review.

We carried, for example, the Choir from Boys Town this year at Christmas time. This was carried by no other network.

I could go through lists of public affairs programming to show you what programming we carried specifically that could not be heard on any other network.

BY MR. FLETCHER:

Were they programs of a type different from types -- some of the types of programs on the other networks? My question was types of programming now, not specific events, not a specific program title.

You have entertainment programs, you have religious programs, they have religious programs. You have agricultural programs, they have agricultural programs. You have news programs, they have news programs.

Are you answering affirmatively to each of these?

[Tr. 270]

A. Yes.

Q. You have educational programs, they have educational programs.

A. May I say I am convinced there is a qualitative difference.

\* \* \* \* \*

[Tr. 272]

Q. Now, Mr. Rafael, I believe you were permitted over objection to state that in connection with making sales presentations, or presentations of sales material, that claims of coverage were made and that these claims of coverage referred to both primary and secondary coverage.

Now, can you give me one instance where you talked to one

[Tr. 273]

agency or any one circumstance, who you talked with, when and where, and what was said, or what was presented from a written point of view with respect to coverage? A. All right, we were in Chicago, to take a recent example. We discussed with the Knox Gelatin people the problems of total coverage of this network.

Now, another example I can give you is the difficulties we had when Alex Dreier was sponsored by Buick, -- Dodge.

Q. Before you leave the first one, you discussed the problems of total coverage.

What representations did you make to these people as to what the coverage of the ABC network was? A. I forget the exact figure, but I think we quoted that we reached something like 95 per cent of all American homes, either primary or secondary coverage.

Q. Who have you that figure? A. I said earlier that I was trying to recollect the exact figure, but the man that does our coverage charts is a man named Mr. Imperial in New York.

Q. Now, I assume that this 95 per cent figure that you used was based upon the exposure there of all the affiliated stations? A. Yes, through all methods of coverage.

Q. Now, do you have any idea what portion of the coverage was allocated to the secondary service of WABC?

[Tr. 274]

No, I am sorry I don't. When I see coverage maps, I just see red and white areas.

Q. Do you recall in connection with that particular conference that a specific reference was made to secondary coverage? A. No, I don't. It was total coverage, which, of course, normally includes primary and secondary.

Q. What do you mean by secondary coverage? What do you refer to? A. The primary area of the market -- what is it, .5 millivolts, I believe? I am not cognizant of the exact technical description.

I am not an engineer, I am sorry.

Q. I am trying to find out what you meant when you used the term.

MR. WILKINSON: Does it include skywave?

MR. FLETCHER: Oh, a lot of suggested help probably could come from Mr. Wilkinson. I am not asking for it. I am not asking for it. I want this witness' understanding of what he was talking about when he was responding to your question.

THE WITNESS: Well, primary coverage is that area in which it is technically possible to produce both a ground wave and a sky wave which would hit a certain number of millivolts in an area. Secondary coverage is that coverage in which the number of millivolts is reduced because you only

[Tr. 275]

have skywave coverage.

MR. WILKINSON: That is a very good answer for a layman.

\* | \* \* \*

[Tr. 280]

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[Tr. 280]

BY MR. FLETCHER:

Q. I think, Mr. Rafael, I cut you off in connection with some illustrations. I pinpointed you to one and you started to talk about another. If you want to complete that answer, I think you should do so.

You started to talk about the Alex Dreier -- A. I was going to say that one thing that we have a great deal -- of course the major problem in networking is the problem of clearance and coverage, and every time you talk to

[Tr. 281]

advertisers, no matter who they are, this is the thing that comes up constantly, because with the inability to measure out-of-home automobile radios and the rest of it, potential coverage is the one thing you have got to sell. That is all I wanted to say.

\* \* \* \* \*

[Tr. 287]

Washington, D. C.  
January 22, 1962

\* \* \* \* \*

[Tr. 289]

JAMES E. DUFFY

was called as a witness, and being first duly sworn, was examined and testified as follows:

PRESIDING EXAMINER: Give your whole name and address to the reporter.

THE WITNESS: James E. Duffy, 19 Lancer Road, Riverside, Connecticut.

DIRECT EXAMINATION

BY MR. WILKINSON:

Q. Mr. Duffy, will you give us your present title and position with ABC. I am vice-president in charge of sales, ABC Radio Network.



Q. How long have you held that position? A. Since September 28, 1961.

Q. As vice-president? A. As vice-president.

Q. Of American Broadcasting Company, a division of American Broadcasting-Paramount Theatres? A. Correct.

Q. How long have you been in charge of sales for ABC Radio network? A. Since May 2, 1960.

[Tr. 290]

Q. Will you briefly outline for the record your previous connections with ABC and your previous radio experience? A. Yes. I will be happy to.

I got into the radio business in 1947 as an announcer and part-time salesman, with an FM station in Beloit, Wisconsin, WBNE, and in July of 1949 I joined the American Broadcasting Company, Central Division, as a writer in the publicity department.

In 1951 I became the assistant publicity director for the American Broadcasting Company, Central Division, both radio and television.

Q. Is Central Division Headquarters in Chicago? A. In Chicago, right.

In May of 1952, I became the director of advertising and promotion for the American Broadcasting Company, Central Division, both radio and television.

In May of 1953 I became an account executive -- that is, a salesman -- with the American Broadcasting Company Radio Network, Central Division.

Two and a half years later -- I don't remember the precise month -- I became an account executive or salesman for the television network, American Broadcasting Company, Central Division.

A year and a half later, or in May of 1957, I became

[Tr. 291]

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[Tr. 291]

the director of sales for the ABC Radio Network Central Division in Chicago.

Then in May of 1960 I came to New York as National Director of Sales for the radio network.

Q. How many salesmen do you have under you at the ABC Radio Network? A. There are nine salesmen and three divisional sales managers.

Q. Describe briefly -- you have already given your title, but describe briefly your functions and responsibilities. A. Well, my responsibility is to bring maximum dollars to the American Broadcasting Company Radio Network from advertisers with national or semi-national distribution on the programs of ABC.

My responsibilities further are to supervise, direct, actively participate in the strategy -- sales strategy, that is -- in the active selling of these programs in directing the divisional sales managers and the nine salesmen across the country.

Further, it is to coordinate and supervise the activity of the sales promotion, sales development and research departments of the company with that of the sales department.

Q. Does the ABC Radio Network have a station rep, so to speak, type of organization or is all the advertising

[Tr. 292]

sold through the employees under your supervision and control?

A. All of the advertising is sold one hundred per cent by the salesmen of the ABC Radio Network and/or the managers.

We do not have a rep, nor, in my experience, have we had one.

Q. And as I understand it, you not only supervise but actively participate in a number of sales that are conducted in the programs over the networks, is that correct? A. Yes, that is correct.

Q. That was true both in the central division in Chicago and your present position in New York? A. Yes, sir, that is correct.

Q. Now, I have shown you, previous to calling you as a witness, certain engineering exhibits that have been received as evidence in this proceeding; is that correct? A. Yes, sir.

Q. Did you participate in obtaining a sponsor for a show, a news show, for 10 p.m. on the radio network? A. Yes, sir, I did.

Q. Would you describe for the Examiner and for the record what that was about? A. Yes.

For some time, the Miller Brewing Company out of Milwaukee, Wisconsin, through its agency, Mathiesson and Sons, had some opportunity in sponsoring a new show that would high-

[Tr. 293]

light the good portions of the news with the international situation as it is and seemingly, with air crashes and so forth, their idea was to highlight some of the more pleasant aspects of the news and bring this to the American people.

Consequently, they discussed this with our programming people and with the sales department, myself included, an account executive out of Chicago who handles the agency and the account, Dick Brahm and the central division sales manager, currently Ed Bischoff.

But one of the concerns of Ed Ball, the advertising manager at Miller, and the people at the agency was the fact that the ABC Radio Network has a good number of daytime-only facilities.

Consequently, in talking about a wrap-up show in the evening, they were concerned about coverage.

Now, we originally discussed this last spring. As a matter of fact, I discussed it with Bob Geary, who is with Mathiesson, and Ed Hinkle, who is the New York representative for Miller, down here in Washington, during the NAB.

These were the preliminary discussions. Subsequently there were several meetings in Milwaukee.

At the time, they wanted to start with this idea actually in January of this year, but it so happened in September, Alex Dreier, who was the personality that we were presenting

[Tr. 294]

for this show, was available on a half sponsorship basis at 6:30 New York time -- 6:30 to 6:40.

In September, Miller started sponsorship of Dreier at that time period -- 6:30 to 6:40. They wanted to add, as I say, this ten-minute show Monday through Friday at ten p.m., and had some real concern about ABC's ability to provide maximum coverage because of these daytime-only stations.

There was a further problem in that Alex Dreier had been working for Meisterbrau, in Chicago over our television affiliate there or owned and operated stations WEKB.

Q. Is Meisterbrau another beer company? A. Yes, it is a competitive beer.

Consequently, WLS as a fifty-thousand watt clear channel station, this concerned them that they would not be in the market and have this umbrella coverage with this facility.

Consequently, in our discussions, we pointed out that WABC is a fifty-thousand watt clear channel station with tremendous coverage and consequently would take up much of the slack that the daytime-only facilities that we have in the eastern portion of the country would not afford them.

They did purchase this and they went on the air on January 1.

Q. 1962? A. Of 1962, right. To the best of my knowledge, this is one of the largest sales to a single advertiser in night-time

[ Tr. 295]

radio in a number of years, because it represents fifteen minutes a night, Monday through Friday, on a 52-week basis. We are very proud of the sale, as a matter of fact.

Q. Now, Mr. Duffy, have we also had some experience in connection with the Patterson-Johansson fight? A. Yes, sir. We have.

Q. Would you explain some of your problems that you encountered there? A. Yes, I would be happy to.

The Patterson-Johansson fight -- this was the third fight, I believe held on March 13 of last year. This fight was programmed at 10 o'clock Eastern Time and again, in putting our salesman out in the field, trying to sell this to national advertisers, this problem of ABC's daytime-only facilities in many markets came up.

Now, we did sell half of the fight itself to the Mennen Company for its men's products. We also sold, finally, after some research, sold the other half of the fight to the Carling Brewing Company out of Cleveland, Ohio.

But because of distribution reasons, Carling wanted to relinquish rights in four major markets, including New York and Chicago.

As part of the overall fight package --

Q. Were those markets in which Carling is not particularly strong?

[Tr. 296]

ularly strong? A. Yes. As I understand it, this is what they said to us and they weren't especially interested in, if they could sell this off through us, if we could sell it, not interested in putting a great portion of their revenue in these markets.

This afforded us the opportunity of selling four markets for the fight itself, but also the pre- and post-fight ceremonies, which were each of fifteen-minute duration.

So I went along with the salesman, Bob Fountain of our New York office, to South Bend, Indiana, to the Studebaker Company, and made a presentation on the pre-and post-fight programs on the full network, plus the four major markets that Carling had relinquished.

Now, obviously, the real enchantment here as far as the advertiser was concerned was the fight itself and not the pre- and post-fight ceremonies, simply because they were concerned about the tunein and tuneout factor on either the pre- or the post.

The fight itself was where they would get the maximum factor, they felt, out of pure logic.

One of the factors that helped in consummating this sale was the fact that we had New York, WABC, a fifty-thousand watt clear channel umbrella station, that we had WLS-Chicago with the same situation, that we had KGO in San Francisco. As a matter of fact, in our sales presentation to

[Tr. 297]

these people, we said that with these three stations, these powerhouse stations and Los Angeles, KABC, they would practically blanket the nation with these four markets alone, as well as getting their exposure on pre- and post-fight ceremony and they bought it and were very happy with it.

I presume they still are. As a matter of fact, if there is another heavyweight championship fight, why, they have an option on the pre-and post-fight ceremonies, I believe.

Q. Now, Mr. Duffy, in connection with your sales work for the ABC Radio Network, do you run into any psychological problems with reference to the history and development and growth of CBS and NBC and the rather late entry of ABC into radio networking operations?

MR. FLETCHER: Mr. Examiner, I would like to object to that question.

PRESIDING EXAMINER: I think that is too broad. I don't know whether this man can be qualified as an active psychologist.

I think if you want to get more specific factual data into the record, you should, Mr. Wilkinson. Some arguments can be made on that.

MR. WILKINSON: I think I will try to approach it from another way.

BY MR. WILKINSON:

Q. You have indicated, I believe, that concern has been

[Tr. 298]

expressed to you in connection with your facilities, that you have a number of daytime facilities? A. Yes, sir.



Q. And that they are not available for nighttime operations?

A. Yes, sir.

Q. Have you encountered any discussions about the fact that ABC has fewer clear channel facilities than the other two major networks?

A. Yes, sir.

MR. FLETCHER: Mr. Examiner, if you please, I was interested in getting the details of these earlier questions and situations, based upon the broad nature of the questions being asked by Mr. Wilkinson, but I think we are getting probably a little too far afield now into the area of hearsay testimony.

What Mr. Wilkinson is asking this witness to do is give somebody else's reactions to somebody. If we are going to be faced with and charged with other people's reactions and attitudes, I think we are entitled to examine them rather than have to rely on this witness.

Because obviously, he would not be in a position to answer questions on cross-examination where he had given hearsay testimony about what somebody else felt.

I object to that question.

[Tr. 299]

MR. WILKINSON: I would like to state in connection with that, Mr. Examiner, that we have here a man who is making sales -- trying to make sales -- and I think some of the problems that he encounters, that he can note for the record, the problems that he encounters in trying to sell the ABC Radio Network at night, even at present.

Included in the next series, steps of questions would relate whether we lost seventeen million more, whether that would be more difficult for our sales problem and so on.

I think this is material to this issue and the witness is perfectly qualified.

MR. NASH: May I speak to that?

I agree with Mr. Wilkinson that the witness is qualified to discuss sales. But in the testimony so far, we have gotten his speculations as

to why sales were gained and why they may not have been gained.

He has not specifically told us who he talked to, what was said to him or what was done.

The testimony so far and the testimony that will probably be elicited in reply to this question would run along the same way, would give us no more than this witness' reactions as a salesman to the reasoning that goes into the customers' buying or not buying a particular -- well, the product that is for sale here, time on a radio network.

This, I must confess, is highly speculative.

[Tr. 300]

It doesn't give us any opportunity for cross-examination. Whatever this witness' "expertese" may be, he could be dead wrong as to why a sponsor buys or does not buy a particular time period.

PRESIDING EXAMINER: I think that this witness, of course, is not qualified to testify as to what is in the minds of others. But I think in this sort of proceeding, he is qualified to testify as to the problems he has encountered.

If you approach it from that point of view, Mr. Wilkinson, I certainly would not sustain the objections, at least in so far as you have indicated your route now.

I think your approach has been primarily as to what other people have said to him. While he may repeat what they have said to state their words, I think the basic rule is that it is the truth that he can't testify to and it is the truth of that that you are concerned with here.

Why not leave him to the more general enumeration of problems that he has encountered and then go on wherever you go from there?

BY MR. WILKINSON:

Q. Mr. Duffy, what are some of the problems you have encountered in selling programs or selling time on the ABC Radio Network? A. Well, one of the major problems, as I indicated before, is the number of day-time-only stations that ABC numbers

[Tr. 301]

among its affiliates and consequently, this lack of power, that has been repeatedly pointed out to me by agencies and by advertisers as against our competitors; basically NBC and CBS, not Mutual.

This, I might say, has been in existence as long as I have been with the network. This has been the chief problem, facilities and power, and it has been constantly pointed out to us.

Q. Is exposure a factor and a problem that you have encountered in sales?

MR. FLETCHER: Mr. Examiner, object to the question and the form of it as a leading question at this particular moment, and I also object to it on the grounds of complete and utter indefiniteness.

I don't have the slightest idea what "exposure" means.

PRESIDING EXAMINER: I think you might want to modify that Mr. Wilkinson.

BY MR. WILKINSON:

Q. Proceed with your enumeration of some of the problems you have encountered in sales. A. One of the problems that we encounter in sales, and this is an area in network radio selling, I think it is a growing one, is providing, obviously, maximum audience or substantial audience, but also maximum coverage for a particular advertiser who has a strong distributor or dealer or bottler

[Tr. 302]

organization and by that I mean this: This is a tremendously important internal situation to a major company such as an oil company, who might make an oil additive. I have a case in mind, as a matter of fact, the Hastings Manufacturing Company, out of Hastings, Michigan, who has a product, Casite, an oil additive, on our network.

It is of maximum importance to them that we cover as many of their dealers, as many of the gas stations that handle this product as possible.

Consequently, in a competitive situation, if we can cover more than our competitors, this can become a tremendously important part of our sales presentation and has, in the past.

Now, that brings to mind another oil additive, as a matter of fact, the Wynn Oil Company out of Los Angeles, who, during this month, and this came about in November, came up with a budget of \$50,000 to spend in a six-week period.

Our salesman on the west coast, Harry Woodworth, put together a presentation under my direction. I talked to both the agency and the advertiser about this problem and we put together a presentation for the entire budget of \$50,000 for this six-week period, starting January 15.

Now, I had been out on the west coast previously, just as part of a background. They had come on the air with us last August and September, after I had been out on the coast

[Tr. 303]

and made a presentation to Beverly Kiem, who is the vice-president in Charge of Advertising for Wynn.

His concern then was expressed to me. They had been on NBC Monitor on the weekend, they were looking for a driving audience, a male audience, obviously, for this type of product.

His concern at that time was ABC Radio Network facilities, power, ability to provide coverage that NBC had provided for them.

When they went on in August and September, this was in the daylight saving time hours, this did not represent as much of a problem.

What I am leading up to is this, that the agency, through our presentation, recommended that the Wynn Oil Company place the entire budget of fifty thousand dollars with the American Broadcasting Company Radio Network.

Late in November, Mr. Kiem came east. He called me from New Jersey and stated that as much as he would like to, he simply could not give us the full fifty thousand dollar budget.

He was afraid because of coverage purposes that he had to split the budget. Actually, it wasn't a split. We got twenty-nine thousand dollars and they upped it -- CBS got twenty-seven thousand dollars, so the budget was up from fifty to fifty-six thousand dollars.

[Tr. 304]

But the reason we did not get all of it was because of our coverage problems in the evening and they did buy Dreier at 6:30 as a co-sponsor with Miller and the rest of the revenue went to CBS for this reason.

Q. Now, if we were to lose seventeen million skywave service, would that help your problems or make them more difficult in selling?  
A. Obviously, it would make it more difficult. We have a hard enough problem now with facilities.

Q. If you were a salesman for your opposing competition, would you have occasion to call attention to the fact that the Flagship operations in New York were of a disparate amount, if that were the situation?

A. I most assuredly would, every occasion I could effect.

Q. And the fact that this information is in the record and if affirmed, doesn't make you too happy, is that correct?

MR. FLETCHER: Mr. Examiner, I think that is completely unnecessary. I don't think we care whether the witness is happy or not.

MR. WILKINSON: I will withdraw the question. The question is withdrawn.

BY MR. WILKINSON:

Q. In presentations that you have made to various ad-

[Tr. 305]

vertisers, have you claimed that over the ABC Radio facilities you can reach a certain percentage of the radio families at night? A. Yes, sir.

Q. Approximately what figures have you quoted to advertisers?  
A. On our full network of stations?

Q. Yes. A. Ninety-five per cent, approximately, of the total homes in the country.

Q. Has your attorney advised you that unless you are claiming secondary or skywave service, you would not have access to ninety-five per cent of the homes in the United States?

MR. FLETCHER: Mr. Examiner, to that question I certainly object. Whether the attorney has advised him anything is completely immaterial. Certainly this would not be a method of establishing a fact.

MR. WILKINSON: I will withdraw the question, Mr. Examiner, in the interest of saving time.

I believe that is all the questions I have of this witness.

PRESIDING EXAMINER: Cross examination, Mr. Fletcher?

CROSS EXAMINATION

BY MR. FLETCHER:

[Tr. 306]

Q. Mr. Duffy, starting with that last subject matter, I believe you testified that in making presentations, you claimed that the ABC network can reach ninety-five per cent of the total radio homes.

Do you know the source of that figure? A. Yes, the source of that figure comes from Chuck Imperial, who is in charge of station coverage for the ABC radio network and as a matter of fact, reports to me, sir.

Q. And do you know his source of information on this? A. No, sir, I don't.

Q. You don't know what he took into consideration? A. No, sir, I don't; precisely, no, the breakdown on it. Any more, I might add, than I would know what NBC or CBS sources are when they claim ninety-seven-point-six or 96.8.

Q. Does your network claim to have more affiliates in the top two hundred markets than any other network? A. Yes, sir.

\* \* \* \* \*



[Tr. 314]

BY MR. FLETCHER:

Q. Now, Mr. Duffy, you have talked about -- I believe you used the phrase power in connection with network sales presentation.

Is it your understanding that WABC will lose any power as a result of the outcome of this proceeding? A. No, sir.

Q. Now, you have also talked about your problem of having a strong, a large number of daytime-only affiliates. Is it not a practice of stations affiliated with the ABC network on occasions to record a program that comes through on the network at hours when they are not operating and then to broadcast that program by means of a taped playback at a subsequent time, such as the next day? A. No, this is not a common practice.

Q. It doesn't happen with ABC network at all?

[Tr. 315]

A. Yes, sir, it has happened in the past, but the fact is that these shows in the evening are, for the most part, news.

Number 1, as I understand it, this is against our news policy, to have more than a three-hour delay. So consequently, a new program delayed until the next morning does not make good programming sense-- at least, this is what we have been told.

Q. Now, in connection with problems that you have encountered, are there factors other than coverage that the potential advertiser takes into consideration? A. Yes.

Q. And what are they? A. Audience, certainly.

Q. Programs? A. Certainly programs. Lineup of markets where these stations are as it might coincide with their desire or bottler or distributor lineup, as I have indicated previously.

Q. Rates? A. Rates, of course.

Q. Now, you have talked about a differential in the facilities of your network as contrasted with NBC and CBS. A. Yes, sir.

Q. Does your rate structure take into consideration this differential?

[Tr. 316]

A. The differential of what? Daytime-only stations?

Q. Whatever the differential was that you talked about. Didn't you talk about a differential in the facilities of the ABC network and the CBS and NBC? A. All right. Fine. I just wanted clarification on what it was you wanted.

Q. Whatever the differential is you were talking about. A. Does our rate take this into consideration.

Q. Yes, sir. A. Yes, I think they do.

Q. Does the ABC radio network have a published rate card?

A. Yes.

Q. Do you have a copy of it with you? A. No, sir.

Q. Can you tell me -- can you give me a basic comparison or some figures that would basically compare the three networks, taking a comparable time period on each of the three networks, and comparable percentage of clearance of affiliates, and tell me what the relative rates would be between ABC radio network, CBS radio network and NBC radio network? A. I might indicate right here that the rate card as such is for various types of programs. Consequently, there are things, as you know, called premium talent costs that would be reflected, for instance, on CBS Arthur Godfrey, that would

[Tr. 317]

not be affected on a news show. So if you are asking me for time costs only for a comparative breakdown, I could be happy to give you an example there.

Q. Fine. A. As far as news is concerned, on the ABC radio network, the open rate for one hundred per cent clearance is one thousand dollars for the full network of stations -- this is on the open rate, the one-to-twelve time rate.

Q. This is for a five-minute program? A. This is for a five-minute program.

PRESIDING EXAMINER: You say this is on ABC or NBC?

THE WITNESS: ABC, sir.

BY MR. FLETCHER:

Q. Now, a comparable figure from the other two networks.

A. I can not speak for the other two networks, but a comparable figure would be, on news, at a one hundred per cent clearance, approximately twelve hundred dollars.

Q. For each of them? A. For each of them.

Q. Now, I believe you testified that you started as a salesman with the ABC radio network in 1953? A. That is correct, sir.

Q. At that time were you familiarized with the nature and character of the physical facilities and coverage of the

[Tr. 318]

ABC affiliates? A. Yes, I made myself familiar with it.

Q. At that time, was WABC enjoying and experiencing secondary sky wave coverage?

MR. WILKINSON: Mr. Examiner, I don't think this man --

MR. FLETCHER: I want this man to answer the question without any help from Mr. Wilkinson.

MR. WILKINSON: This man is not an engineer.

THE WITNESS: At that time I believe WABC was a fifty-thousand watt clear channel station, to the best of my recollection. I am not an engineer.

BY MR. FLETCHER:

Q. I haven't tried to qualify you as an engineer. I asked you what you learned as of that time. You said you familiarized yourself with the facilities. I want you to tell me what you learned as of that time as to the characteristics of the coverage and facilities of WABC. A. Let me point this out right here --

Q. Can you recall specifically what you learned? A. About WABC? No, sir.

Q. At that time? A. No, sir.

Q. Then that is a very good answer. You don't have to worry about anything else if you don't know.

[Tr. 319]

A. There were three hundred fifty-five affiliates at that time, Mr. Fletcher.

Q. Well, now, who other than Mr. Wilkinson informed you as to the characteristics of the WABC coverage prior to your coming here to testify? A. Break that down. The specifics of it, you mean?

Q. Yes. A. Before my appearance here?

Q. Yes, sir. A. No one, sir.

Q. You talked to no one other than Mr. Wilkinson about your testimony prior to come here? A. No. I had conversation with my eastern sales manager in New York based on the fact that I was coming down here. Certainly Bob Pauley, the president of the network.

Q. Mr. Duffy, let me ask you this, before you saw this material that Mr. Wilkinson showed you, had you ever seen any figures as to the secondary sky wave coverage of WABC? A. Figures, sir?

Q. Yes, sir. A. Specifically?

Q. Yes, sir. A. No, not specifically, not specific figures.

Q. Now, let's talk about this Alex Dreier program for

[Tr. 320]

just a moment.

How long is this contract, the one that ended up as nighttime sponsorship, ten to ten: fifteen? A. A fifty-two week contract.

Q. Is it subject to the usual cancellation clause? A. I don't know what you mean by usual.

It is subject to cancellation at thirteen week cycles, four weeks prior to the end of each cycle.

Q. Is that the customary cancellation clause that ABC network has in its contracts? A. No. We have some firm orders on the books for twenty-six weeks and so forth. That is customary if a campaign is in thirteen-week cycles; yes. If it is a fifty-two week order, it is usually in thirteen-week cycles, I might say.

However, to clarify that, we do have orders that are twenty-six weeks firm, that are of fifty-two weeks' duration, twenty-six weeks firm and then cancellable on four weeks' notice after that twenty-six weeks firm contract.

Q. Being a fifty-two week contract, it would be entitled to the fifty-two time discount as a fifteen-minute program on the network?

A. Yes, sir.

Q. What would be the program rate that would be applicable to that program?

[Tr. 321]

Based on your own rate card? A. Well, the time cost on a fifty-two week basis would be based on per five minute unit, seven hundred dollars or fourteen hundred dollars for ten minutes.

In other words, I am working with a segmented rate card now.

Q. What are your card rates that would be applicable to this particular contract? A. I just told you, sir, seven hundred dollars per five-minute units.

Q. There are three of them? A. There are three five-minute units, but you are talking about this one program, 10:00 to 10:10, right?

Q. Oh, I thought it was fifteen minutes. What is the card rate on this program, 10:00 to 10:10, \$1400? A. Right; per program for time.

Q. Per program for time. A. That is right.

Q. Is that the rate on which that program was sold? A. That is correct.

Now, I might add here, too, that we have a rate card that is based on weekly dollar volume discounts and that, consequently, the tie-in to the 6:30 show gives the additional dollar volume weekly that would be taken into effect here.

Q. Mr. Duffy, are you familiar with the other 50 kw

[Tr. 322]

stations in New York City, roughly from the standpoint of facilities which they are offering in competition to WABC? A. Well, sir, as far as the other networks, the competing networks, yes, sir.

Q. Are you familiar with the other 50 kw stations in town? Do you know whether there are any others? A. Yes, I believe they are, but I am not concerned with them in our selling efforts.

Q. Do you know whether all the 50 kw stations in New York City have secondary sky wave coverage? A. No, sir, I don't. I would imagine there are some that do not.

Q. Do you know whether NBC does? A. Yes, I believe they do. I have been told that they do, yes.

Q. And do you know whether CBS does? A. Yes; they do.

Q. Do you know whether WNEW does? A. No, I don't.

Q. Do you know whether WMGM does? A. No, sir.

Q. WINS? A. No, sir.

Q. Would the availability of sky wave service to all those stations be a factor in the ability to get business?

[Tr. 323]

A. I would think so.

MR. WILKINSON: Mr. Examiner, this witness does not sell WABC by itself. This is a radio network.

PRESIDING EXAMINER: I think it is fair to ask a man who has had this much experience as a salesman questions. You qualified him as an expert. I think that as an expert, he can answer.

BY MR. FLETCHER:

Q. Mr. Duffy, is not this true, that based upon the precision, taking into consideration the competition which all radio gets from television during the evening hours, that today the basic pattern of



radio network selling is to tie it in with a daytime sale? A. Yes, to a great degree.

Q. Outside of this Alex Dreier program, do you have one network sponsor that buys time only during the evening hours? A. No. Simply because the majority of purchases now are on a saturation basis.

\* \* \* \* \*

[Tr. 334]

REDIRECT EXAMINATION

BY MR. WILKINSON:

Q. You were asked a question about ABC claiming that it covered the top 200 markets with affiliates. A. Yes, sir.

Q. Are any of those affiliates daytime only? A. Yes, sir.

Q. Can you name a few markets where we have daytime only affiliates? A. Yes, sir. Miami, Boston, Louisville, Birmingham, Oklahoma City, Houston, St. Louis, Kansas City, --

Q. That is sufficient for present purposes. A. It makes me feel better.

Q. Yes, I hate to have to express this on the record. Are there a number of them where we are limited to 50 watt

[Tr. 335]

stations, Class IV stations? A. Yes, sir.

Q. Now, turning to another question that was asked you, Mr. Duffy, about typical written presentations, what is usually contained in a written presentation, Question No. 1, and then, Question No. 2 to follow that would be, do you make any presentation in addition to written presentations when you try to sell time? A. The first question, what is the --

Q. Generally included in a written presentation, the so-called typical presentations? A. Well, basically what is contained in the presentation is a generic rundown on the ABC Radio Network, the

specific property or program we are trying to sell to a prospective advertiser, and the reasons that we feel as a network it is a good advertising vehicle for this prospective advertiser in that it might meet his marketing pattern in stations by market, by audience levels, in other words, by an audience composition breakdown that might better coincide than our competitors, or some other media with the particular product he has to sell, the audience figures, the efficiency figures, a station line-up -- this is basically what goes into a presentation.

Q. Now, do you have oral presentations, oral pitches to the advertiser, too, to try to sell the network, orally

[Tr. 336]

in addition to your written presentation? A. I would say that for every written presentation there are at least three oral presentations. In other words, I don't know of any experience I have had where there has been solely a written presentation and gotten an order or lost an order, there is always an oral presentation, to either the agency or to the advertiser, and we prefer to both, and the philosophy that we have now in selling network advertising is to get to the advertiser unless it is negating the agency.

Q. Do you run into situations where one or another or both of the big competing networks are trying to sell the same advertiser?

A. Yes. As a matter of fact, we run into the situation where, when we have an advertiser on the air, our competitors are trying to sell them on their network and off of ours.

Q. You mentioned a situation awhile back, I think, on direct. Do I understand that WLS on one of your night programs was not available to carry the particular sponsor of that program because they had a competing buyer in the Chicago-Milwaukee area. A. It wasn't on the night program, it was on the 'Alex Drier' Good News Program.

Q. And WLS, therefore, is not bringing that program into this skywave differential area that was shown you on

[Tr. 337]

page 15, is that correct? A. Yes, sir, that is correct.

Q. Do you run into situations like that with competing products where it is impossible to get clear answers of various affiliates and so on because they have competing advertising commitments? A. It is rare on a national level. This was a rare situation, because the buyer with the personality was on our local television, but it is not so rare on the local level where the local station might have sold the particular national spot advertiser on a long term basis and consequently we come through with a news program and might have a competitor and consequently it calls for a DB or a non-clearance.

\* \* \* \* \*

[Tr. 352]

PRESIDING EXAMINER: You stated you had a statement you wish to make, Mr. Wilkinson?

MR. WILKINSON: Yes.

In order that it may be accurately transcribed with commas and proper punctuation into the record, I am going to give the reporter a copy.

"My client has authorized me to state on the record in this proceeding, before the record is closed, that during the pendency of the Clear Channel proceeding (Docket No. 6741), when it was still undetermined whether any Class I-A channels listed in Rule 3.25 would be 'broken down,' ABC vigorously opposed the licensing of a second station on 770 kc, and more particularly the SSA operations of KOB on that frequency.

"Since ordering the instant further hearing in Docket No. 6584, to determine whether the result there reached in 1958 (16 RR 765) should be modified in the

[Tr. 353]

light of additional data here to be adduced, the Commission on

September 13, 1961 adopted a final Report and Order in the Clear Channel Proceeding (31 FCC 565), in which it has concluded to break down eleven channels heretofore classified as I-A's so as to place a single Class II-A station on each such channel in a state or states there designated. Rule 3.22(d) as thus amended provides and I quote, 'The cochannel Class I-A station shall be protected by the Class II-A station to its 0.1 mv/m contour daytime and its 0.5 mv/m, 50 per cent skywave contour nighttime.'

"In the event the decision thus reached in the Clear Channel Proceeding is not hereafter substantially changed, as a result of petitions for reconsideration now pending and as a result of any subsequent court review thereof, I am authorized to state that ABC is prepared to acquiesce in the placement of a second station on 770 kc in the Rocky Mountain area, provided WABC (like the Class I-A stations on the eleven clear channels which were broken down in Docket No. 6741) is not required to directionalize, and provided the second station placed on 770 kc (like the eleven Class II-A stations contemplated in Docket No. 6741) is required to

[Tr. 354]

protect WABC's 0.1 mv/m contour daytime and its 0.5 mv/m 50 per cent skywave contour nighttime.

"In here indicating a willingness to have a Class II-A facility placed on 770 kc, in the same fashion that the Commission in the Clear Channel proceeding has proposed to place Class II-A stations on eleven other clear channels, we are not thereby conceding that NBC's owned and operated station on 660 kc in New York would not continue, under such a set up, to enjoy a

preferred position over ABC's flagship operation on 770 kc. However, we do concede that such treatment would place us on a par with that proposed in Docket No. 6741 for the CBS clear channel station in New York City."

\* \* \* \* \*

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BRIEF FOR RESPONDENTS-APPELLEE

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,567

AMERICAN BROADCASTING-PARAMOUNT  
THEATRES, INC.,  
v.  
Petitioner,

UNITED STATES OF AMERICA and FED-  
ERAL COMMUNICATIONS COMMISSION,  
Respondents.

No. 18,046

AMERICAN BROADCASTING-PARAMOUNT  
THEATRES, INC.,  
v.  
Appellant,

FEDERAL COMMUNICATIONS COMMISSION,  
Appellee,  
HUBBARD BROADCASTING, INC.,  
Intervenor.

No. 18,045

HUBBARD BROADCASTING, INC.,  
Appellant,

v.  
FEDERAL COMMUNICATIONS COM-  
MISSION,  
Appellee,

AMERICAN BROADCASTING-PARAMOUNT  
THEATRES, INC.,  
Intervenor.

No. 18,078

HUBBARD BROADCASTING, INC.,  
Petitioner,

v.  
UNITED STATES OF AMERICA and  
FEDERAL COMMUNICATIONS COMMISSION  
Respondents,  
AMERICAN BROADCASTING-PARAMOUNT  
THEATRES, INC.,  
Intervenor.

ON PETITIONS FOR REVIEW OF AND APPEALS FROM DECISION AND ORDERS OF THE  
FEDERAL COMMUNICATIONS COMMISSION

WILLIAM H. ORRICK, JR.,  
Assistant Attorney General

LIONEL KESTENBAUM,  
GERALD KADISH,

Attorneys,  
Department of Justice  
Washington, D.C. 20554

Respondent in Case Nos. 17,567  
and 18,078

United States Court of Appeals  
for the District of Columbia Circuit

FILED DEC 24 1963

*Nathan J. Paulson*  
CLERK

MAX D. PAGLIN,  
General Counsel,

DANIEL R. OHLBAUM,  
Associate General Counsel,

RUTH V. REEL,  
Counsel,

MICHAEL FINKELSTEIN,  
Counsel.

FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554





### STATEMENT OF QUESTIONS PRESENTED

In a stipulation approved by the Court on October 16, 1963, Appellee-Respondent Federal Communications Commission and Respondent United States of America, without prejudice to their positions on the Motions to Dismiss (see pp. 13-14 infra.), agreed that the questions set forth in the Brief for Appellant-Petitioner Hubbard Broadcasting, Inc., were presented by Case Nos. 18,045 and 18,078.

In such stipulation, it was further agreed that Question No. 3 set forth in the Brief for Petitioner-Appellant American Broadcasting Company-Paramount Theatres, Inc., was presented by Case Nos. 17,567 and 18,046, but it was not agreed that questions 1 and 2 set forth therein were presented by such cases.

In addition, in the stipulation, Respondents Federal Communications Commission and United States of America stated that Case No. 17,567 presented the following issue:

Whether the Commission determined in Docket No. 6741 that the frequency 770 kc should be utilized by two Class I stations at night, and if so, whether the record in the proceeding, together with the Commission's 1958 decision in Docket No. 6584, support the determination.

and Appellee Federal Communications Commission and Intervenor Hubbard Broadcasting, Inc., stated that Case No. 18,046 presented the following issue:

Whether the Commission correctly decided in Docket No. 6584 on July 3, 1963 that ABC had not shown that, as a network, it would be prejudiced by the requirement that Station WABC, New York, operate directionally at night.

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 17,567

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AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,  
Petitioner,

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS  
COMMISSION,

Respondents.

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No. 18,045

---

HUBBARD BROADCASTING, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,  
Appellee,

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,  
Intervenor.

---

No. 18,046

---

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,  
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,  
Appellee,

HUBBARD BROADCASTING, INC.,

Intervenor.



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No. 18,078

---

HUBBARD BROADCASTING, INC.,  
Petitioner,

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS  
COMMISSION,  
Respondents,

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,  
Intervenor.

---

ON PETITIONS FOR REVIEW OF AND APPEALS FROM DECISION AND ORDERS  
OF THE FEDERAL COMMUNICATIONS COMMISSION

---

BRIEF FOR RESPONDENTS-APPELLEE

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COUNTERSTATEMENT OF THE CASE

The statement of the case by Petitioner-Appellant American Broadcasting-Paramount Theatres, Inc. (ABC) contains much extraneous and irrelevant material,<sup>1/</sup> and the statement of the case by Appellant-Petitioner Hubbard Broadcasting, Inc. (Hubbard) is somewhat argumentative. Therefore, it is believed that this further statement will be of assistance to the Court.

These cases seek review of the Commission's decision of July 8, 1963 granting an application by Hubbard for directional

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<sup>1/</sup> Indeed, ABC's statement, in large part, repeats almost verbatim the statement contained in its brief in an earlier case, (American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission, 108 U.S. App. D.C. 83, 280 F.2d 631), which involved issues wholly different from the instant case.

operation on 770 kc by Station KOB in Albuquerque, New Mexico, and denying an application by ABC for renewal of its license for non-directional operation on 770 kc by Station WABC in New York City without prejudice to further consideration if ABC should amend the application to propose directional operation. In addition, ABC challenges the Commission's orders in the "clear channel" proceeding, insofar as the Commission there declined to disturb a 1958 amendment to Section 3.25 of its Rules, 47 CFR 3.25, which permitted two Class I stations to operate on the frequency 770 kc in lieu of the previous limitation to one.

The cases bring before the Court once again the long-continuing dispute between the licensees of Stations KOB and WABC as to whether the frequency 770 kc should be used to accommodate KOB's need for a Class I frequency assignment to replace the Class I frequency it lost in 1941 as a result of a broadcasting treaty. The earlier history of the controversy is summarized in the Court's opinion in American Broadcasting Co. v. Federal Communications Commission, 89 U.S. App. D.C. 298, 191 F.2d 492. The background immediately pertinent to the present phase of the dispute is set forth in American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission, 108 U.S. App. D.C. 83, 280 F.2d 631, which affirmed the Commission's 1958 amendment to Section 3.25 of its Rules to permit two Class I operations on 770 kc.<sup>2/</sup>

<sup>2/</sup> On September 26, 1962, the licensee of KOB changed its name from KSTP, Inc. (formerly Albuquerque Broadcasting Company) to Hubbard Broadcasting Company. For simplicity we will hereafter refer to the KOB licensee as Hubbard. Although KOB's license has specified  
(cont'd)

On September 3, 1958, the Commission issued a decision and order (Albuquerque Broadcasting Co., 25 F.C.C. 683), in which it determined that the public interest would be served by having stations KOB and WABC both operate on 770 kc as unlimited time Class I stations, both employing mutually protective directional antennas at night. This determination was predicated on the Commission's conclusions that "only if KOB is restored to the status of a Class I-B station would it be enabled to provide a broadcast service even nearly adequate to fulfill the needs of the comparatively greatly underserved populations in the Southwest" (25 F.C.C. at 783-784), and that the use of 770 kc for this purpose, rather than the other frequency considered (1030 kc), would better effectuate Section 307(b) of the Communications Act, 47 U.S.C. 307(b). Accordingly, the Commission amended Section 3.25 of its Rules to permit two Class I operations on the frequency 770 kc.<sup>3/</sup> It granted KOB leave to amend its application for 770 kc to propose the type of directionalized operation specified in its Decision, and granted WABC leave to apply for authority to directionalize its operations on 770 kc in like manner.

<sup>2/</sup>(cont'd) the frequency 1030 kc since the early 1940's, it has been operating on 770 kc pursuant to special authorizations and in 1944 filed an application for modification of construction permit and license to specify regular operation on 770 kc. It was this application which gave rise to the proceedings before the Commission.

<sup>3/</sup> Prior to the Commission's decision, Section 3.25 of the Rules permitted unlimited time operation on 770 kc by only one station, which was designated as a Class I-A ("clear channel") station. Under the rule as amended, operation by two Class I-B stations would be permitted. For the distinction between Class I-A and Class I-B stations, see American Broadcasting Co. v. Federal Communications Commission, 89 U.S. App. D.C. 298, 300 n. 1, 191 F.2d 492, 494-495, n. 1, and Sections 3.21, 3.22 and 3.25 of the Commission's rules, 47 CFR 3.21, 3.22 and 3.25.

ABC appealed from that decision to the Court, claiming that the Commission had erred in considering only two channels as possible frequencies for KOB and that KOB should be accommodated on a frequency other than 770 kc to avoid an adverse impact on network competition. In the latter connection, ABC complained of the Commission's failure to accept the evidence it proffered on its claim that sharing 770 kc with KOB would seriously affect the operations of the ABC network's "flagship" station and thus place the ABC network at a competitive disadvantage vis-a-vis other networks.<sup>4/</sup> While the Court sustained the rule amendment against these objections, it indicated that ABC should be heard at some appropriate time on its claim of network competitive prejudice, stating (American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission, 108 U.S. App. D.C. 83, 87-88, 280 F.2d 631, 635-636):

[We] do not think that the position of ABC as a network should be permanently prejudiced by forcing it to share a channel if other networks are given full use of clear channels. This inequity, if it exists or is permitted to exist, should be cognizable by the Commission in a proper proceeding brought before it by ABC, even though the assignment of KOB to 770 kc is permitted to continue. In other words, the Commission should seek to provide channel facilities to the ABC network on a basis which is fair and equitable in

<sup>4/</sup> In its brief, ABC had stated that the "factual matters on which ABC asked to be heard" included, inter alia, "that clear channel facilities are essential to the successful operation of a national radio network. . . that the income from owned-and-operated clear channel stations provides networks with revenues essential to net-working operation. . ." Brief for Appellant-Petitioner, pp. 42-43, American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission, 108 U.S. App. D.C. 83, 280 F.2d 631.

comparison with other networks. Whether this is to be done by permitting ABC to intervene in the clear channel proceedings now pending, or through some other means, is not for us to say. It may be that ABC can raise its claims in this regard by filing competitive applications when present licensees on other frequencies seek renewal or by seeking modification of existing licenses held by others. Perhaps the Commission will afford, sua sponte, some other procedural remedy. Thus, we do not believe that ABC has been or should be precluded from a hearing on its claim that the public interest requires that the loss of service in the East, which Class I broadcasting from Albuquerque produces, be absorbed by some eastern broadcaster other than WABC. Any failure by the Commission to give due consideration to ABC's claims for treatment comparable to that accorded to other networks, when raised in an appropriate manner, may be brought to the courts for review.

In the meantime, while ABC's appeal was pending, Hubbard filed an amended application for Station KOB proposing directionalized operation on 770 kc in accordance with the Commission's September 3, 1958 decision (R. 12). ABC, however, did not file an application for authority to make changes in the operation of station WABC; rather, it applied only for renewal of license for station WABC, requesting a continuation of its unlimited time, non-directional operation (R. 861-905). Subsequently, on February 24, 1960, Hubbard filed a competing application for a construction permit for a new standard broadcast station to operate on 770 kc at New York City with a directional antenna at night, as specified in the Commission's decision (R. 8).

Although ABC's application for renewal of license on a non-directional basis did not conform to the Commission's public interest determination in its 1958 decision and conflicted with Hubbard's

amended application for KOB, the Commission decided to accept the ABC application and to reopen the KOB proceedings for the limited purpose of determining whether network competitive considerations should alter its 1958 determinations. In a Memorandum Opinion and Order released on August 4, 1961 (R. 7-14) the Commission noted the above-quoted statement of the Court concerning ABC's network position, and stated (R. 12-13) that:

it would be appropriate at this time to... consider any additional evidence to be presented by WABC with respect to its network position on the frequency of 770 kilocycles and to determine in the light of such evidence whether the issue is such that it overrides the 307(b) determination previously rendered by the Commission in its decision of September 3, 1958. Therefore, we propose to consolidate WABC's application... for renewal of license for hearing with [Hubbard's] amended application... for Albuquerque, New Mexico, and to reopen the record in that proceeding for such limited purpose, and for that purpose alone.

The Commission designated as an issue in the hearing, with the burden of proof upon ABC:

To determine whether the consideration of providing facilities to the ABC network in New York on a basis which is fair and equitable in comparison with other radio networks should vary the conclusion with respect to issue 1, above. (R. 14).

Issue 1 called for a determination of whether, in view of the Commission's September 3, 1958 decision, the public interest would be served by a grant of the ABC or Hubbard application. In addition, a third issue was included to determine which of the two applications should be granted. The Commission made clear, however, that issues 1 and 3 were included only in order "to permit the Commission



to take appropriate action upon the . . . applications in the light of the additional evidence to be adduced pursuant to issue 2", and that no evidence was to be admitted under issues 1 or 3 (R. 13).

In that Memorandum Opinion and Order the Commission also ruled that Hubbard's application for 770 kc in New York was entitled to comparative consideration with the WABC renewal application, and that the comparative hearing on the competing New York applications would follow the WABC-KOB hearing if WABC was then still entitled to comparative consideration. It stated (R. 13):

We do not deem it appropriate to consolidate [Hubbard's] application. . . for New York City for hearing at this time since after the hearing ordered herein has been completed a comparative hearing with WABC's renewal application may prove to be unnecessary. . . . Furthermore, the possibility exists that the Commission may deny WABC's renewal application, but in its discretion. . . find it in the public interest to afford WABC a final opportunity to file an application for authority to make changes in the operation of Station WABC in the manner specified in . . . our September, 1958 decision in this proceeding. Should these findings be made, and should WABC choose to file such an application, the comparative hearing would then be between [Hubbard's] pending proposal for New York City and WABC's new application.

Subsequently, Hubbard, by appeal under 47 U.S.C. 402(b) and petition for review under 47 U.S.C. 402(a), sought review in this Court of the Commission's refusal to consolidate its New York application in the hearing on its KOB application. The Commission moved to dismiss the appeal and petition for review on the ground that the order appealed from was not a final order subject to review. This motion was granted on October 27, 1961, and rehearing was denied on January 15, 1962. KSTP, Inc. v. Federal Communications Commission, Case Nos. 16,577, 16,578 (C.A.D.C.).

About one month after ordering the WABC-KOB hearing, the Commission issued its decision in the clear channel proceeding. Clear Channel Broadcasting in the Standard Broadcast Band, 31 F.C.C. 565. Since the frequency 770 kc is one of the clear channels, the Commission included 770 kc in its discussion of each of the clear channel frequencies. After noting the necessity for "further hearings" involving 770 kc (31 F.C.C. at 595), the Commission found no basis in the clear channel proceeding for altering its 1958 rule amendment as to that frequency.

The Commission's clear channel decision, in all other respects, was subsequently affirmed by this court. The Goodwill Stations, Inc. v. Federal Communications Commission, (C.A.D.C. Case No. 17498, decided October 31, 1963).

The WABC-KOB hearing was held in January, 1962 and the hearing examiner issued an initial decision on May 28, 1962 (R. 421-458, 646-683), proposing that Hubbard's application be granted and ABC's denied (R. 458, 683). The examiner found that there was "no doubt. . .that ABC has established it is being treated differently from the way which CBS and NBC are being treated insofar as network facilities via their respective owned and operated stations in New York are concerned" (R. 437, 662). However, he concluded that ABC had not demonstrated "that the results which will or may reasonably be expected to flow from that difference in treatment are sufficient to require or justify a finding that ABC, as a network, is not provided with facilities in New York on a basis which is fair and equitable in comparison with other networks." (R. 437, 662)

Following exceptions to the initial decision and oral argument thereon, the Commission issued its Decision and Order of July 8, 1963, (R. 502-510, 833-841) granting the KOB application and denying the WABC renewal application without prejudice to reconsideration in a comparative hearing with Hubbard's New York application if ABC should amend its application to propose directional operation within 30 days. The Commission adopted the examiner's findings and conclusions except as modified in its Decision and rulings on exceptions (R. 503, 834). In agreement with the examiner, the Commission defined the issue before it as follows (R. 506, 837):

It was recognized, in the Commission's 1958 Decision herein, that Station WABC would suffer a significant loss of secondary and primary service through directionalizing its nighttime operation to protect that of KOB. However, it was concluded there that the gain of KOB's primary and secondary service to be realized in unserved and underserved areas would more than offset the losses of WABC in terms of the overall public interest, and that the requirements for a fair, efficient, and equitable distribution of radio service would be better met through such operation. The Court sustained this determination, and the only question before us now is whether the effect of WABC's losses upon the network's competitive position are such as to require a different result.

The Commission concluded that ABC had not demonstrated that it, as a network, would be prejudiced or that competition among radio networks would be lessened by the requirement that Station WABC directionalize nighttime (R. 507-508) In this connection, it stated (R. 507):

It may be conceded that the Commission's requirement that WABC directionalize nighttime while WCBS and WNBC are permitted to operate non-directionally would leave ABC with a facility in New York inferior, from the standpoint of coverage, to those of NBC and CBS.

ABC, however, has failed to translate the comparatively inferior coverage of WABC into a competitive inferiority of the ABC radio network vis-a-vis NBC and CBS.

The Commission accordingly concluded that ABC had failed to show why the Section 307(b) determination reached in its 1958 decision should not be controlling. However, while finding that the public interest would be served by denial of ABC's application for renewal of its existing non-directional operation, the Commission was persuaded by the evidence submitted that "ABC should not be deprived of its New York outlet without an opportunity for a hearing on the comparative merit of any application filed by it for directionalized operation, divorced from the 307(b) considerations of the instant proceeding." (R. 508, 839). Accordingly, the Commission afforded ABC 30 days within which to amend its renewal application by filing an additional application for modification of the facilities of WABC, specifying the nighttime directionalized operation contemplated by the Commission's 1958 decision (R. 508, 839).

Thereafter, on July 26, 1963 the Commission granted ABC's motion for a stay of the 30 day period until the conclusion of judicial review of the Commission's denial of the WABC renewal application (R. 856). Subsequently on October 17, 1963, the Commission moved the Court for an order permitting entry of a Memorandum Opinion and Order <sup>5/</sup> released by the Commission on that day in which the Commission on its own motion concluded that, effective upon the approval

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<sup>5/</sup> This order also stayed the effectiveness of its Decision of July 8, 1963 pending judicial review in order that ABC might continue operating the station until the conclusion of judicial review.

by the Court, the July 26, 1963 stay order should be vacated. On November 12, 1963, the Court ordered that the Commission's motion be held in abeyance pending the hearings of these cases on the merits.

COUNTERSTATEMENT AS TO JURISDICTION

Case No. 17,567 is a Petition for Review, filed by ABC on January 25, 1963 pursuant to Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. 402(a), Sections 2, 3 and 4 of the Judicial Review Act of 1950, 5 U.S.C. 1032-1034, and Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, seeking review of the Commission's Report and Order in the clear channel proceeding insofar as it pertains to the frequency of 770 kc.<sup>6/</sup> See page 9, supra. On motion of the respondents Commission and United States, the Court on March 22, 1963, ordered that Case No. 17,567 be held in abeyance until thirty days after the Commission's final decision in the KOB-WABC hearing.

Case No. 18,046 is an appeal filed by ABC on August 7, 1963 pursuant to Section 402(b) of the Communications Act, 47 U.S.C. 402(b) and Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, from the Commission's decision in the KOB-WABC hearing insofar as it granted Hubbard's application for modification of the construction permit for station KOB and denied ABC's application for renewal of license for non-directional operation by station WABC.

<sup>6/</sup> The Report and Order was adopted by the Commission on September 13, 1961 (Clear Channel Broadcasting In the Standard Band, 31 F.C.C. 565). Reconsideration was denied on November 21, 1962 (Clear Channel Broadcasting In the Standard Broadcast Band, 24 Pike & Fischer, R.R. 1595).

Case No. 18,045 is an appeal filed by Hubbard on August 7, 1963, in reliance on Sections 402(b)(1) and (6) of the Communications Act, 47 U.S.C. 402(b)(1)(6), from the Commission's decision in the KOB-WABC hearing insofar as it allegedly "granted" ABC's application for renewal of license for WABC "for an indefinite period" and "denied" Hubbard's application for a construction permit for a New York station without hearing. On August 21, 1963, ABC, which had intervened in Case No. 18,045, moved that Hubbard's appeal be dismissed. The Commission filed a response to ABC's motion on August 30, 1963, in which it supported the motion on the ground that the Commission had not denied a Hubbard application (as would be necessary for an appeal to lie pursuant to Section 402(b)(1) of the Act) and Hubbard was not aggrieved by the grant or denial of any other application (as would be necessary for an appeal to lie pursuant to Section 402(b)(6) of the Act). On October 1, 1963 the Court ordered that ABC's motion be held in abeyance pending the hearing of the case on the merits.

Case No. 18,078 is a Petition for Review filed by Hubbard on August 27, 1963 in which Hubbard, in reliance upon Section 402(a) of the Communications Act, 47 U.S.C. 402(a), and Sections 2 and 3 of the Judicial Review Act of 1950, 5 U.S.C. 1032, 1033, seeks review of the Commission's decision in the KOB-WABC hearing insofar as it afforded ABC an opportunity to amend its renewal application to a directional proposal, and failed to order an immediate comparative hearing between Hubbard's application for a construction permit for a New York station and ABC's application for renewal of license



for non-directional operation of station WABC. On August 29, 1963, ABC, which had intervened in Case No. 18,078, moved that Hubbard's petition for review be dismissed. Respondents Commission and United States filed a response to ABC's motion on September 6, 1963, in which they supported the motion on the ground that Hubbard was not seeking review of a final order of the Commission. On September 27, 1963 the Court ordered that ABC's motion be held in abeyance pending the hearing of the case on the merits.

The above-described cases were consolidated by the Court on October 1, 1963 upon motion of the Commission.

SUMMARY OF ARGUMENT

I.

The Commission's determination that two directional Class I operations on 770 kc would best effectuate Section 307(b) of the Communications Act was previously sustained by the Court. American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission, 108 U.S. App. D.C. 83, 280 F.2d 631. That determination is not open to renewed challenge by ABC now. The Commission reopened the matter for the limited purpose of ascertaining whether its previous determination should be changed on the basis of a showing of serious adverse effect on ABC's network position. The only issue properly before the Court is the propriety of the Commission's conclusion that ABC has failed to substantiate its claim of network prejudice.

II.

The Commission correctly concluded that the disparity in the nighttime coverage of the New York stations of the networks was not per se a matter of public concern unless ABC's network operations would be affected. It found that ABC had not shown that the reduced nighttime coverage of WABC would have any adverse effect upon the ABC network's programming, financial position, sales of time to advertisers, or upon its capacity to compete with other radio networks in keeping and acquiring station affiliations. The Commission properly concluded that ABC had failed to translate the comparatively inferior coverage of WABC into prejudice to its position as a network resulting in public detriment. ABC has not demonstrated that the standard applied by the Commission was erroneous or that its evaluation of the record was unwarranted.

THIRD PART

The Commission's Decision and Order of July 8, 1963 cannot reasonably be construed as making any grant to ABC, or as denying Hubbard's New York application. The Commission made clear that it was merely affording ABC a final opportunity to amend the WABC renewal application to a directional proposal so that it might obtain comparative consideration with Hubbard's application. This action, where ABC was not disqualified as an entity, was a reasonable exercise of the Commission's authority in view of the public interest in treating networks comparably and the background and special circumstances of this case making exceptional procedures appropriate. Hubbard was not prejudiced by the Commission's refusal to consolidate its New York application into the WABC-KOB hearing. It would have been equally proper for the Commission to have afforded ABC an opportunity to amend during such a hearing, after an adverse resolution of the threshold issue as to the mode of operation to be permitted on 770 kc in New York.

ARGUMENT

- I. THIS COURT HAS PREVIOUSLY SUSTAINED THE COMMISSION'S DETERMINATION THAT TWO DIRECTIONALIZED CLASS I OPERATIONS ON 770 KC WOULD BEST EFFECTUATE SECTION 307(b) OF THE COMMUNICATIONS ACT. THAT DETERMINATION IS NOT OPEN TO RENEWED CHALLENGE BY ABC NOW.

Much of ABC's brief (see, e.g., ABC Br. 35-48) seeks to relitigate matters resolved by the Court's decision in American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission, 108 U.S. App. D.C. 83, 280 F.2d 631. The Court there affirmed the Commission's amendment of Section 3.25 of the Commission's Rules to permit two Class I directionalized operations on 770 kc as a valid exercise of the Commission's authority under Section 307(b) of the Communications Act, 47 U.S.C. 307(b). While the Court stated that ABC was entitled to be heard at some appropriate time on its claim of competitive network prejudice, it affirmed the Commission's decision in the face of the claim that the Commission had ignored that factor, and it did not require such a hearing as a condition precedent to Commission action implementing the rule amendment. Rather, the Court made clear that the Commission could permit the assignment of KOB on 770 and consider ABC's claim of prejudice in some other context either devised by the Commission sua sponte, or initiated by ABC by the filing of a competing application when the licensee on another frequency should seek renewal (108 U.S. App. D.C. at 87-88, 280 F.2d at 635-636).

Since ABC's application for renewal of its license for non-directional operation was patently inconsistent with the amended Section 3.25 and with the underlying public interest determinations

in the 1958 decision, the Commission could have dismissed that application without hearing. It was not required to reconsider issues validly disposed of in the decision affirmed by the Court. United States v. Storer Broadcasting Co., 351 U.S. 192, 205; Transcontinent Television Corp. v. Federal Communications Commission, 113 U.S. App. D.C. 384, 389, 308 F.2d 339, 344; The Goodwill Stations, Inc. v. Federal Communications Commission, . U.S. App. D.C. , , F.2d , (decided October 31, 1963).

That the Commission decided sua sponte to reopen the matter and to accord ABC a hearing on its claim of prejudice to its network in the very proceeding which gave rise to the claim, does not reopen the Commission's 1958 determination to renewed challenge by ABC now. The further hearing was specifically and properly limited to the question of whether any effect on ABC's network position might override the earlier determination (R. 12-13).<sup>7/</sup>

Accordingly, the only issue properly before the Court is the propriety of the Commission's conclusion that ABC failed to establish at the further hearing that curtailment of WABC's service area would substantially prejudice ABC's position as a network with resultant public injury.

<sup>7/</sup> Therefore, ABC's proffered evidence designed to compare the coverage gains and losses of KOB and WABC (R. 69-72, 139-149) and its discussion of such gains and losses (ABC Br. pp. 45-46) are clearly irrelevant.

II. THE COMMISSION PROPERLY DETERMINED THAT ABC HAD FAILED TO SHOW ANY SUBSTANTIAL PREJUDICE TO ITS POSITION AS A NETWORK.

The Commission ruled that ABC had not substantiated its claim that the nighttime reduction in WABC's service area would seriously affect ABC's network service to the public. It recognized that there was a disparity between WABC's coverage, due to the addition of KOB on the frequency and the requirement for directionalization by WABC, and the coverage of the New York stations licensed to Columbia Broadcasting System (WCBS) and National Broadcasting Company (WNBC). However, it concluded that such disparity per se was not a public consideration in the absence of a showing that ABC's network operations would be affected. This conclusion was a correct approach to the public interest and correctly reflected the record before the Commission.

ABC apparently believes that its network is entitled to complete equality with the facilities licensed to any other licensee which also maintains a radio network service, at least so far as its principal New York station is concerned. This approach is patently unsound. First of all, it is a basic principle of the Communications Act that the public interest, rather than the private interest of any licensee, is the governing standard. Sanders Brothers Radio Station v. Federal Communications Commission, 309 U.S. 470, 475-476; Scripps-Howard Radio, Inc. v. Federal Communications Commission, 316 U.S. 4, 14-15; Carroll Broadcasting Co. v. Federal Communications Commission, 103 U.S. App. D.C. 346, 349-350, 258 F.2d 440, 443-444; Television Corporation of Michigan v. Federal Communications Commission, 111 U.S. App. D.C. 101, 104-105, 294 F.2d 730, 733-734.



We do not believe that this Court in the earlier ABC decision intended to indicate any departure from this principle. On the contrary, it stated that ABC's claim of inequity should be examined in the light of the public interest. Therefore, a comparatively disadvantageous position of any station vis-a-vis its competitors in terms of power, frequency, or received interference, cannot govern a Commission decision in the absence of relevance to the paramount public interest in the use of the radio spectrum.

Secondly, it should be noted that what is urged here is injury to a network organization not licensed by the Federal Communications Commission. While a network's service to the public may be a relevant factor, the network itself as a business entity is in no different position from any other organization which may happen to be a licensee of a broadcast station.

The relevant question here, therefore, was whether the record supported a finding of public detriment which would warrant a change in the Commission's earlier decision, sustained by this Court, that the frequency of 770 kc could best be utilized by a directionalized operation for the station using that frequency in New York. The Commission recognized that although WABC presently serves substantially the same areas and populations at night as do WNBC and WCBS, directionalization would cause WABC to serve at night about 700,000 fewer persons in its primary service area and about 17,000,000 fewer persons in its secondary service area (R. 503).<sup>8/</sup> However it properly concluded that ABC had "failed to translate the

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<sup>8/</sup> Primary service is provided by a station's groundwave signal. Under the Commission's rules, secondary service is provided at  
(cont'd)

comparatively inferior coverage of WABC into a competitive inferiority of the ABC radio network vis-a-vis other networks" (R. 507), let alone into public detriment.

As discussed in detail below, the Commission found that ABC had not shown that the reduced nighttime coverage of WABC would have any adverse effect upon the ABC network's programming, financial position, sales of time to advertisers or upon its capacity to compete with other networks in keeping and acquiring station affiliations. It considered ABC's claim (Br. 28-32) that it now trails other networks in the number of clear channel and full-time affiliates. But the Commission found no basis in the record for concluding that the curtailment of WABC's nighttime coverage would significantly alter this pre-existing situation or preclude ABC from acquiring other clear channel and full-time affiliates if it desired. ABC has not established that these conclusions constitute an erroneous appraisal of the record.

The Commission noted preliminarily that the curtailment of WABC's service area will not leave the ABC network without other outlets in most of the loss area or affect its ability to reach such area through the alternative means of station affiliates. The record showed that practically all of the 17,000,000 persons losing

8/ (cont'd) at night by a station's skywave signal, i.e., that portion of the energy which travels upward and outward from the transmitter into the upper atmosphere (the ionosphere), from which it is reflected back to earth at night at distances much greater than the reach of groundwave signals. Skywave signals are less constant in intensity than groundwave signals, because of the continuous change in the characteristics of the ionosphere and other variables, resulting in "fading" from time to time in skywave reception. The only stations whose secondary service is recognized by the Commission are Class I stations. See the Commission's Report and Order of September 14, 1961 in Docket No. 6741, 31 F.C.C. 565, 567-568.

WABC's secondary service would continue to have ABC network service available from another ABC owned or affiliated station (R. 504, 506).<sup>9/</sup> Thus, 99% of the secondary loss area would receive service from ABC-owned station WLS in Chicago and 65% would receive service from ABC-affiliated KXEL in Waterloo, Iowa (R. 504).<sup>10/</sup> While the NBC and CBS networks have a greater number of affiliates serving the WABC primary and secondary loss areas (R. 504), the Commission found that ABC had made no showing that it could not secure affiliations with other stations serving these areas to equalize this difference as well as replace the WABC signal (R. 506).

The Commission also noted that there has been a continual improvement in ABC's competitive position vis-a-vis NBC and CBS since its creation in 1943, despite the fact that KOB was then already occupying the frequency 770 kc pursuant to special authorization.<sup>11/</sup>

<sup>9/</sup> Three ABC affiliates provide nighttime primary service to small portions of the area in which WABC's primary service would be curtailed, but most of these 700,000 persons would not have ABC network programming available through any other primary service (R. 503-504).  
<sup>10/</sup> It may be noted at this point that it is difficult to understand the implication of ABC's reference in its brief (p. 30) to testimony that "one or two skywave signals are not a reliable or dependable source for a given program service . . ." Surely ABC is not arguing that WLS, KXEL and WABC would together provide "reliable or dependable" service but that without WABC such service would not be provided by WLS and KXEL. In any event, the record does not support either WABC's statement or that conclusion. See Tr. 119

<sup>11/</sup> As the Court noted in the earlier case, KOB did not begin to protect WABC with a directional array until April, 1957, and WABC has accordingly enjoyed its existing nighttime coverage area only since that time. American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission, 108 U.S. App. D.C. 83, 85, 280 F.2d 631, 633.

In 1943, AP<sup>1</sup> owned three standard broadcast stations, including WABC, and was affiliated with 163 others (R. 505). By 1951, ABC had a total of 298 AM affiliates, including six clear channel stations. And at the time of the hearing ABC had 397 affiliates, more than either NBC or CBS, and had more affiliates in the top 200 markets than any other network (R. 505). Moreover, apart from the fact that the number of ABC network affiliates has been increasing, such affiliates are clearing more network programming than in the recent past (R. 503).

While ABC claimed general inferiority in the number of full-time and clear channel affiliates, the Commission was unable to determine from the record whether there was any overall inferiority in the matter of affiliation since ABC failed to submit comparative figures on the number of full-time and clear channel affiliates and the populations served (R. 503). It did note, however, that ABC claimed network coverage of 95% of American homes, compared to 96.8% and 97.6% claimed by CBS and NBC, respectively (ibid.).

The Commission also took official notice that after the record was closed, ABC acquired affiliation with four additional clear channel stations, including two serving portions of the WABC secondary service loss area, and ten other affiliates, most of which were full-time stations (R. 505, fn. 5 and 6). In any event, even conceding that ABC now trails the other networks in clear channel and full-time affiliations, the Commission regarded the important circumstance to be that "ABC has not claimed, much less demonstrated, that it has been precluded from obtaining such affiliations through an inferior competitive position" (R. 505).

In this connection, the Commission noted that the question of whether a particular station will affiliate with a given network is one decided by the station and the network, and not the Commission (R. 505-506). As it noted (R. 506), the extent to which a network is able to acquire affiliates is dependent upon the programming service it offers and the compensation it is willing to pay the affiliating station, as well as the judgment and abilities of the network's principals. It was of paramount significance to the Commission, therefore, that ABC failed to show that the curtailment of WABC's nighttime service area would have any adverse effect upon its capacity to compete with other networks in keeping and acquiring station affiliations, or upon network's programming, financial position or sales of time to advertisers (R. 506).

As the Commission pointed out (R. 504): "No direct evidence was offered on the question of how present and prospective time-buyers would act in the future with respect to the ABC network if WABC were required to directionalize, although the network's vice-president for sales testified as to some isolated instances of problems encountered in the acquisition of sponsors." While these isolated problems included ABC's existing comparative inferiority in nighttime coverage,<sup>12/</sup> ABC did not show how the curtailment of WABC's secondary service area would significantly worsen its present disadvantage vis-a-vis the NBC and CBS networks insofar as securing sponsors and advertisers on the basis of secondary coverage is concerned.

Indeed, the record reflects that the secondary coverage of WABC is of little consequence to the ABC network in attracting advertising support because of its existing disadvantage in the matter of

<sup>12/</sup> The vice-president testified that one sale had been lost because of the network's "coverage problem at night" (Tr. 304).

secondary coverage generally. The hearing examiner, whose decision was adopted by the Commission,<sup>13/</sup> found that ABC "does not rely particularly on secondary service as an important factor and does not use it as an important tool in securing advertising sponsors or revenue for the network" (R. 451-453, 678). Thus, the examiner noted (R. 436, 455, 661) that in order to interest potential advertisers ABC stresses its clear superiority over those networks in the matter of "inside coverage", i.e., the greater number of ABC local affiliates over-all, and in the top 200 markets. According to ABC, local affiliates "generally get more acceptance and believability from programming and commercials than do outsider stations whose signals may reach into a local market" (R. 436, 661).

In addition, the examiner found that except for one program, ABC does not have network sponsors who purchase time only during evening hours (R. 455). On the contrary, the majority of ABC's sales are on a "saturation" basis, i.e., commercials broadcast during both daytime and nighttime hours (R. 455, 680). As ABC's Vice-President in charge of sales testified, the basic pattern of network radio selling is to "tie-in" nighttime sales with daytime sales (ibid.). That WABC's nighttime coverage does not figure largely in ABC's network sales is further reflected by the admission of the same Vice-President in charge of sales that until ABC's counsel informed him of WABC's coverage before he testified at the hearing, he had no knowledge of the areas reached by WABC's secondary signal (R. 451, 676).

<sup>13/</sup> See p. 10 supra. The Commission made no changes in the examiner's findings on this aspect of the case.



Nor did ABC offer any factual evidence concerning the ABC network's financial position (R. 504, 835). After sustaining an objection to ABC's attempt to elicit testimony from its vice-president in charge of programming that the network was operating in the "red", the hearing examiner recessed the hearing for several days in order that ABC might submit actual figures as to its financial position (R. 432-433). ABC determined not to introduce such evidence (R. 437, fn. 33) despite its earlier allegation to the Court that it sought a hearing to show that "the income from owned-and-operated clear channel stations provides networks with revenues essential for networking operations." Brief for Appellant-Petitioner, p. 43, American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission, 108 U.S. App. D.C. 83, 280 F.2d 631 (Case Nos. 15399 and 15400). This omission to adduce information lying peculiarly within ABC's own knowledge warrants an inference that it would not support that allegation. In any event, ABC has not established that the financial position of the network would be prejudiced by curtailment of WABC's service area, or that network revenues would be inadequate to maintain its network programming and attract affiliates.

ABC also failed to offer any detailed evidence of the extent to which station WABC carries network programs during nighttime hours (R. 440). There is testimony that WABC carries about 80 percent of all ABC network programs exclusive of sustaining musical programs. However, ABC did not submit any evidence as to the hours during which this network programming is carried, what proportion of the network's programs are sustaining music programs or when such programs are carried, or how much of the total programming of the

network is nighttime programming (R. 440-441).

The only detailed programming evidence offered by ABC consisted of "selected items of programming carried by Station WABC" during a one-year period (R. 432,657). This evidence, discussed in ABC's brief (pp. 32-34), was rejected by the hearing examiner,<sup>14/</sup> whose ruling was affirmed by the Commission on the ground that (R. 504, fn. 5):

Evidence of WABC and ABC network programming is considered admissible only to the extent that it bears upon the question of competitive impact, i.e., that the network will lose its ability to present certain programming through loss of technical facilities or adequate revenues, and will thereby be deprived of its appeal to listeners and affiliates, with resultant diminution of its competitive position.

The Commission conceded the worthiness of the programs to which ABC pointed, but found (R. 504):

ABC . . . neither claimed nor demonstrated that such programming would be affected by the required directionalization of WABC, or that, if it were to be so affected the ability of ABC to compete as a network would be impaired (Ibid).

Thus, contrary to ABC's assertion (Br., p. 32) its proffered program

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<sup>14/</sup> The examiner stated with respect to the proffered exhibit (R. 440, fn. 42):

"A review of this offer of proof shows that, if it were accepted for the limited purpose of showing the nighttime ABC network programs transmitted by Station WABC, it would not be helpful, as aside from programs clearly identified as Station WABC programs, it only shows nine programs broadcast on Sundays after 6 p.m., some of which are obviously not network programs; one ten-minute daily program (5 days a week) which may be a network program; and well over 100 individual programs broadcast between January 8, 1960 and October 15, 1961. While many or even most of the individual programs may have been network programs, some were clearly not and others are in the doubtful category. In any event, they cover about 100 hours over a 21 month period when about 2,500 to 3,000 hours of broadcast time between nightfall and midnight were available."

evidence would not "point up the public interest consequences to the ABC network and to the population thus lost." Indeed, it was for the specific reason that the evidence would not demonstrate such consequences that it was excluded. Clearly, then, ABC did not demonstrate that the nighttime directionalization of WABC would have any affect on the programming operations of the ABC network.

Finally, ABC did not offer any specific evidence in areas other than advertising, programming and affiliations, on the basis of which the Commission could conclude that its network position would be prejudiced. Surely, ABC's discussion of "Intervening Changes in Allocation Philosophy" (Br. pp. 36-39) and "New Data Available to the Commission for the First Time" (Br. pp. 39-41) does not constitute such evidence. This discussion constitutes, in essence, an attempt to relitigate the propriety of the Commission's 1958 determination regarding 770 kc, upon considerations other than the effect of that determination upon ABC's network position.<sup>15/</sup> For the reasons stated supra. at pp.17-18 we believe such discussion to be irrelevant now.

In the absence of a showing that ABC's network operations would be prejudiced, the Commission properly rejected ABC's basic thesis that the disparity in the coverage of the New York stations of the networks was per se prejudicial to the ABC network and detrimental to the public interest (supra, pp.19-21 ).

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<sup>15/</sup> A similar attempt is contained in ABC's brief at pp. 41-48.

It stated (R. 507):

The mere fact that the frequency 770 kc has been treated differently from other clear channels does not establish such action as arbitrary or prejudicial. Compelling public interest reasons, explained at length in the 1958 Decision herein, justify the separate consideration of this channel and the somewhat different disposition of it. Even assuming that some greater showing of prejudice to the ABC network could be made, despite the failure to make such a showing in this record, we believe that these public interest considerations are paramount. The requirement of directionalized operation by both KOB and WABC will achieve a more suitable distribution of radio service. There are means other than the basic frequency allocation structure for achieving a more fully competitive distribution of network stations and affiliates, if ABC should find that necessary.

The Court sustained that conclusion as within the Commission's authority in the earlier case. No different result should obtain now that ABC's claim of network prejudice has been heard by the Commission and found to be unsubstantiated.

Accordingly, the record warrants the Commission's conclusion that ABC had not shown that it would be prejudiced as a network or that competition among networks would be substantially lessened by the requirement that WABC directionalize nighttime. While the record may contain some evidence in support of ABC's position, the Commission's judgment that the showing was insufficient should not be overturned unless the record as a whole would require a contrary conclusion.

Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 747. Viewed in its entirety the evidence of record falls far short of requiring a different result here.

III. THE COMMISSION HAS NOT MADE ANY GRANT TO WABC OR DENIED HUBBARD'S NEW YORK APPLICATION. ITS ACTION IN AFFORDING ABC AN OPPORTUNITY TO APPLY FOR DIRECTIONALIZED OPERATION AND OBTAIN COMPARATIVE CONSIDERATION WITH HUBBARD'S PENDING APPLICATION, WAS A REASONABLE EXERCISE OF THE COMMISSION'S AUTHORITY IN THE CIRCUMSTANCES

Appellant Hubbard contends (Br. 15-25) that the Commission has in effect granted ABC a renewal of license for non-directional operation, thereby denying Hubbard's competing New York application without comparative hearing, and that its action is accordingly procedurally invalid under Section 309 of the Communications Act, 47 U.S.C. 309, and Ashbacker Radio Corp. v. Federal Communications Commission, 326 U.S.

327. However, the Commission's Decision and Order of July 8, 1963 cannot reasonably be construed as making any grant to ABC.

The Commission's order provides in pertinent part (R. 508, 839):

\* \* \* the application of American Broadcasting Paramount Theatres, Inc., for renewal of license of Station WABC, New York, New York, IS DENIED, without prejudice to reconsideration if ABC files, within 30 days of the release date hereof, an application for modification of facilities on the frequency 770 kc in conformity with the parameters specified in paragraph 22 of the September, 1958 Decision herein (25 FCC 683, 16 RR 765).

It is clear from the Commission's decision that the Commission has refused WABC a renewal of license with a non-directional antenna. The bulk of the decision is devoted to ABC's contention that a non-directional operation should be permitted on 770 kc in New York because of network competitive considerations (R.505-508, 836-839). This contention was rejected. Moreover, the Commission made an express finding

(R. 508, 839) that "the public interest would be served \* \* \* by denial of WABC's application for renewal of its existing non-directionalized operation."

That the order also provides for reconsideration in the event ABC should now propose a directionalized operation, does not lend support to Hubbard's assertion (Br. 18-21) that ABC has been granted a renewal of license for non-directional operation conditioned upon a subsequent application for modification of facilities. Reconsideration of the denial of one of two competing applications prior to comparative hearing, is not tantamount to a grant. Plainly, the sole consequence here would be reinstatement of ABC's renewal application, minus the objectionable feature, for further Commission consideration in accordance with the required procedures.<sup>16/</sup>

Indeed, the Commission made clear that the proviso was merely to afford ABC an opportunity to amend its renewal application so that it might obtain comparative consideration with Hubbard's New York application. It stated (R. 508, 839):

The evidence herein, while falling far short of that which would require alteration of the Com-

<sup>16/</sup> Hubbard's argument (Br. 18-19) that there is nothing to modify prior to a license grant, misses the point. The requirement that ABC file an application for modification of facilities is merely a technique for accomplishing an amendment of the renewal application. Obviously, the net effect of the two applications would be that ABC was seeking a renewal of license on 770 kc with directionalized, rather than non-directionalized operation.



mission's 1958 Decision, does persuade the Commission that ABC should not be deprived of its New York outlet without an opportunity for a hearing on the comparative merit of any application filed by it for directionalized operation, divorced from the 307(b) considerations of the instant proceeding. Therefore, ABC will be afforded a final opportunity to seek a permit to conform its operation to the parameters specified in the 1958 Decision and to obtain comparative consideration with the application of Hubbard Broadcasting, Inc. for directionalized operation on 770 kc in New York.

Thus, the Commission has in no way repudiated its earlier ruling (R. 13) that Hubbard's New York application is entitled to a comparative hearing. Hubbard's real complaint would appear to be that the Commission has accorded ABC an opportunity to remove the unacceptable feature of its renewal application, and that the comparative hearing will be with that application as amended rather than as originally filed.<sup>17/</sup> Hubbard asserts (Br. 12, 25) that "ABC elected to stand on its application for renewal of license" for non-directional operation and should accordingly suffer a denial with prejudice. But the Commission has determined (R. 508, 839) that this harsh consequence would be contrary to the public interest, in light of the evidence in the record as to the importance of a New York outlet to the ABC network. Its decision to deny without prejudice rests on a valid public interest consideration, and is within the flexibility the Commission must have

<sup>17/</sup> Although Hubbard seems to complain also of the delay in the consideration of its New York application, such delay is not presently attributable to the Commission. On October 16, 1963 the Commission sua sponte sought to vacate its earlier stay of the 30 day period within which ABC could amend its proposal to specify directionalized operation in order to expedite consideration of Hubbard's New York application. This action was taken subject to the Court's approval and the Commission moved the Court for partial reconsideration in this respect. However by order dated November 12, 1963, the Court held the Commission's motion in abeyance pending the hearing of these cases on the merits.

to meet its statutory obligations. United States v. Storer Broadcasting Co., 351 U.S. 192, 205.

The Court has already stated that network competition is a relevant factor to be considered by the Commission in weighing the public interest, and that ABC is entitled to be heard on its claim that curtailment of the service area of its "flagship" station would unduly restrict network competition. American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission, 108 U.S. App. D.C. 83, 87-88, 280 F.2d 631, 635-636. While the Commission properly concluded that ABC had failed to establish at the hearing that the curtailment would so prejudice its competitive position as a network as to warrant non-directional operation, the loss of the station itself would obviously be a much more serious matter. In deciding that ABC should not suffer this further and graver loss without an opportunity to compete with Hubbard for the facility, the Commission properly acted pursuant to its obligation to "seek to provide channel facilities to the ABC network on a basis which is fair and equitable in comparison with other networks." American Broadcasting-Paramount Theatres, Inc., supra, 108 U.S. App.D.C. at 87, 289 F.2d at 635.

Indeed, exceptional measures are particularly appropriate because of the background and special nature of this long-continuing controversy as to the proper use of the frequency 770 kc. The Court has rejected a contention by ABC that the Commission abused its discretion and erroneously departed from the technical requirements of its rules by permitting further prosecution of the KOB application in these dockets

after two major amendments to that application. As the Court noted, these proceedings "have long been pursued as exceptions to the general method of handling applications" and the Commission's general policies are not "so unyielding as not to allow special proceedings to take care of such a special situation." American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission, 108 U.S. App. D.C. 83, 86 fn. 1, 289 F.2d 631, 634, fn. 1; United States v. Storer Broadcasting Co., 351 U.S. 192, 205.

For these reasons we do not think that any different situation would have prevailed if the Commission had consolidated Hubbard's New York application into the WABC-KOB hearing. The issue as to what mode of operation should be permitted on 770 kc in New York would have required threshold resolution in any event.<sup>18/</sup> If the Commission has properly permitted ABC to amend, it would have been equally proper for the Commission to have afforded ABC the same opportunity after an adverse resolution of that issue but before a final decision, even though the Hubbard application was in the hearing. Whether the applications were consolidated or heard seriatim, the public interest in treating networks comparably and the special circumstances here would warrant a waiver of the general rules governing amendment of applications.<sup>19/</sup>

<sup>18/</sup> Until that issue was resolved, the Commission would be unable to determine whether ABC's non-directional proposal was a factor in its favor or one precluding a grant.

<sup>19/</sup> Whereas Hubbard complains here (Br. 5) that the Commission has waived its "cut-off" rule (R. 13, fn. 4), 47 CFR 1.354(c), an amendment after designation for hearing would require a waiver of Section 1.311(b) of the rules, 47 CFR 1.311(b).

Accordingly, we submit that Hubbard has not been deprived of a fair hearing on its New York application. Although entitled to compete with ABC for the use of 770 kc in New York, Hubbard filed its application with knowledge of the related WABC-KOB controversy in which it was a participant. Hubbard cannot validly claim error because the Commission has preserved the opportunity for comparative hearing and resolved the equities of the parties in a manner which will allow a full effectuation of the public interest.

We do not mean to suggest, of course, that the consideration of providing channel facilities to networks on a fair and equitable basis is the only public interest factor pertinent to the New York applications, or that it would be dispositive against a non-network application found to be of superior merit. We only urge that in the circumstances of this case, ABC should not lose its primary New York outlet without this opportunity to comply with the Commission's decision as to the best use of the frequency, and to compete with the new applicant in a comparative hearing.

**BRIEF FOR PETITIONER-APPELLANT**

**United States Court of Appeals**

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 17,567

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., Petitioner,

v.

UNITED STATES OF AMERICA  
and  
FEDERAL COMMUNICATIONS COMMISSION,  
HUBBARD BROADCASTING, INC.,

Respondents,  
Intervenor.

No. 18,046

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,  
HUBBARD BROADCASTING, INC.,

Appellee,  
Intervenor.

On Petition to Review and Appeal from Decisions and Orders  
of the Federal Communications Commission

United States Court of Appeals  
for the District of Columbia Circuit

FILED NOV 20 1963

*Nathan J. Paulson*  
CLERK

November 25, 1963.

JAMES A. McKENNA, Jr.  
VERNON L. WILKINSON

McKenna & Wilkinson  
1735 DeSales Street, N. W.  
Washington, D. C. 20036

Attorneys for  
Petitioner-Appellant





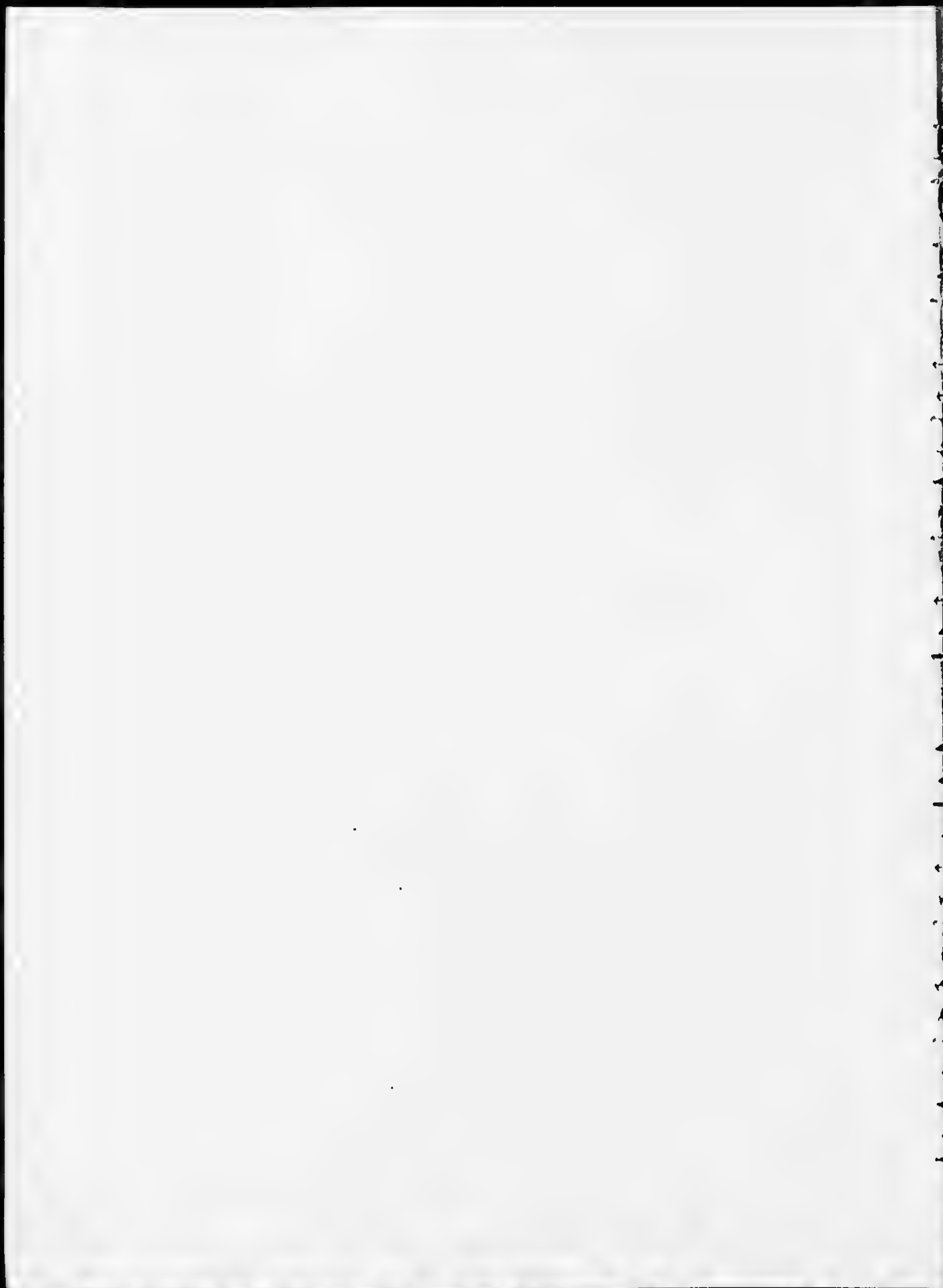
(i)

**PETITIONER-APPELLANT'S STATEMENT OF  
THE QUESTIONS PRESENTED**

1. Whether the actions here challenged, authorizing two unlimited time Class I operations on Class I-A Channel 770 kc, and to that end requiring the heretofore dominant station (WABC) to directionalize, thus curtailing by some 18 million the number of persons presently receiving primary and secondary coverage from the flagship station for the ABC radio network, taken by the Commission after it rejected in the Clear Channel Proceeding (because of resultant "substantial dislocations") any comparable dual directionalized Class I set-ups on any of the other 24 Class I-A channels, were arbitrary, unwarranted, illegal, violative of the public interest, and contrary to the decision and mandate of this Court in Case Nos. 15,399 and 15,400 (108 U.S. App. D.C. 83, 87-88).

2. Whether the disparate treatment accorded the ABC radio network and its New York flagship operation (in Docket 6584 and 6741) vis-a-vis that accorded its two major network competitors in Docket 6741, with ABC having indicated its willingness to accept in Docket 6584 a Class I and Class II-A breakdown of 770 kc comparable to that ordered for NBC's and CBS's New York flagship operations on 660 kc and 880 kc in order to end the KOB controversy, was arbitrary, illegal, prejudicial, violative of the public interest, and contrary to this Court's decision and mandate in Case Nos. 15,399 and 15,400 (108 U.S. App. D.C. 83, 87-88).

3. Whether the Commission's rejection of proffered data designed to contrast the public interest gains by KOB in the west with the public interest losses by WABC and by the ABC radio network in the east, if WABC were required to directionalize and protect KOB, was erroneous.



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# **United States Court of Appeals**

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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No. 17,567

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**AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., Petitioner,**

**v.**

**UNITED STATES OF AMERICA  
and  
FEDERAL COMMUNICATIONS COMMISSION,  
HUBBARD BROADCASTING, INC.,**

**Respondents,  
Intervenor.**

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No. 18,046

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**AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., Appellant,**

**v.**

**FEDERAL COMMUNICATIONS COMMISSION,  
HUBBARD BROADCASTING, INC.,**

**Appellee,  
Intervenor.**

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On Petition to Review and Appeal from Decisions and Orders  
of the Federal Communications Commission

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**BRIEF FOR PETITIONER-APPELLANT**

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## **JURISDICTIONAL STATEMENT**

Case No. 17,567 is a petition by American Broadcasting-Paramount Theatres, Inc. (ABC), as licensee of Station WABC, New York, N. Y. (770 kc, 50 kw, U) and as the operator of a nationwide radio network, for review

by this Court: (a) of the Report and Order of the Federal Communications Commission adopted September 13, released September 14, 1961, in the Clear Channel Proceeding (Docket 6741), wherein the Commission, notwithstanding the pendency of an adjudicatory proceeding directed to that specific matter (Docket 6584), concluded that two Class I stations should be authorized on 770 kc (31 FCC 565, 597, para. 90); (b) of the concurrently taken action of the Commission amending Rule 3.25 to permit the assignment of "two Class I stations" on the frequency 770 kc (31 FCC 565, 605-606); and (c) of the Commission's Memorandum Opinion and Order of November 21, released November 28, 1962, wherein the Commission upon reconsideration reaffirmed the aforesaid actions (24 RR 1595). In Case No. 17,567 this Court's jurisdiction is invoked under Section 402(a) of the Communications Act of 1934, as amended (47 U.S.C. Sec. 402(a)), Sections 2, 3, and 4 of the Judicial Review Act of 1950 (5 U.S.C. Secs. 1032, 1033, and 1034), Section 10 of the Administrative Procedure Act (5 U.S.C. Sec. 1009), and the doctrine enunciated in Cohen v. Beneficial Industrial Loan Association, 337 U.S. 541 (1949).

Case No. 18,046 is an appeal by ABC from a Commission decision, adopted July 3 and released July 8, 1963, in a "further hearing" ordered by the Commission in the "KOB proceeding" (Docket 6584) in July 1961 for the stated purpose, among others, of complying with the admonitions of this Court in 108 U.S. App. D.C. 83, 87-88 — wherein the Commission, although having in the meantime repudiated the dual Class I approach to the Clear Channel problem with respect to the remaining 24 Class I-A channels, (a) refused to "vary" its 1958 action "permitting" two Class I stations on 770 kc, (b) granted an application (BMP-1738) by Hubbard Broadcasting, Inc. requesting Class I rights on 770 kc for Station KOB, Albuquerque, N. Mex. (770 kc, 50 kw, U, DA-N), and (c) denied ABC's application for renewal of WABC's long-held license for nondirectional 50 kw operation on 770 kc in New York City (35 FCC 36). In Case No. 18,046 this Court's jurisdiction is invoked under Sections 402(b)(1), (2), and (6) of the Communications Act of 1934, as amended (47 U.S.C. Sec.

402(b)(1), (2), and (6)), Section 10 of the Administrative Procedure Act (5 U.S.C. Sec. 1009), and the decision and mandate of this Court in American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission, 108 U.S. App. D.C. 83, 88, 280 F.2d 631 (1960).

### STATEMENT OF THE CASE<sup>1</sup>

American Broadcasting-Paramount Theatres, Inc. (ABC) is the licensee of Station WABC, New York, N. Y. (770 kc, 50 kw, U). Station WABC (formerly WJZ), the flagship station for ABC's nationwide radio network, is one of the country's pioneer stations (1921); it has had Class I (clear channel) status since 1928. Until the Commission took the actions here complained of, WABC was the only station regularly and duly licensed to operate with 50 kw power both day and night on 770 kc.

Hubbard Broadcasting, Inc. (Hubbard) is the licensee (since 1957) of Station KOB, Albuquerque, N. Mex. From 1922 to 1928 KOB operated with various powers on several different frequencies, but never on 770 kc nor on any channels adjacent thereto (R.\* 1-3).<sup>2</sup> From 1928 to 1938 it

<sup>1</sup> The background facts are here stated in somewhat summary fashion: (1) Because certain factual data can be better discussed in connection with legal points hereinafter raised, thus avoiding needless repetition; and (2) because related facets of the so-called "KOB proceeding," dating back to 1941, have already been before this Court on three prior occasions — in Case Nos. 10,496 and 10,570 (American Broadcasting Co. v. Federal Communications Commission, 89 U.S. App. D.C. 298, 191 F.2d 492 (1951)); in Case No. 12,883 (American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission, 14 RR 2020 (1956); and in Case Nos. 15,399 and 15,400 (American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission, 108 U.S. App. D.C. 83, 280 F.2d 631 (1960)).

<sup>2</sup> In connection with the first three appeals in the KOB proceeding (Docket 6584), the Commission supplemented the record on each successive appeal. As a result, except for Tr. \_\_\_ material, the previous records were consecutively paginated (R. 1-7646), as were the printed Joint Appendices, with J.A. 1-202 covering the first appeal, J.A. 203-427 the second, and J.A. 429-877 the third. Although explicitly denominated a "further hearing" in Docket 6584, the Commission for some reason in connection with the present appeals abandoned its consecutive pagination system (R. 1-1029). In an effort to avoid confusion, "J.A. \_\_\_" will be used herein to refer to portions of the record printed in connection with the three previous appeals. "R.\* \_\_\_" will be used to designate unprinted portions of the record in the earlier appeals, whereas "R. \_\_\_" will be used to designate the material certified in connection with the instant appeals.

operated with 10 kw power as a share-time station on 1180 kc (R.\* 50-54). It did not receive a regular license for unlimited time operation (with 10 kw power) on 1180 kc until 1939 (R.\* 93). On May 7, 1940, after the 1937 NARBA had been ratified by the requisite four signatories, including the United States, and the provisions of that treaty looking toward a general reshuffling of frequencies had already become effective, KOB was granted a construction permit for 50 kw power on 1180 kc (J.A. 12-14; see NARBA, Art. VI, 1 RR 51:13; cf. 1 RR 51:1). Before the required construction was completed, and as a part of the NARBA reshuffle, the Commission granted KOB a regular license, effective March 29, 1941, to operate as a Class II station on 1030 kc, with 10 kw power, unlimited time, with a proviso that KOB could go to 50 kw by installing a directional array to protect WBZ, Boston, Mass. (R.\* 165, 183, J.A. 26, 40). In June 1941, pending the installation of such an array, the Commission granted KOB an SSA to operate with 50 kw day and 25 kw night on 1030 kc (J.A. 46-47).<sup>1</sup>

Thus, at the time the operating assignments of some 800 U.S. stations were realigned to conform to the requirements of NARBA (J.A. 16), the frequency 770 kw vis-a-vis KOB was in no way involved. That frequency did not become entangled with KOB until October 14, 1941, some eight months after the NARBA shifts had been concluded, when the Commission on its own motion and without any request from the station itself granted KOB a 90-day SSA to operate on 770 kc (50 kw day, 25 kw night) as part of an extensive skywave measurement program then being undertaken on a number of frequencies (J.A. 48). With the attack on Pearl Harbor some seven weeks later, that measurement program was interrupted (and never resumed), leaving KOB "dangling" with a three-months' SSA on 770 kc (50 kw day, 25 kw night, non-DA), a license on

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<sup>1</sup> That KOB acquiesced in this shift from 1180 kc to 1030 kc is borne out by the fact that its counsel, at the subsequent hearing in January 1945, placed in evidence a duly certified copy of its original objection, carrying the following Commission notation: "Letter dated 3/3/41 withdrawing objection" (Tr. 21, 258). KOB was only one of several stations which came out of the NARBA shuffle with allegedly less desirable operating assignments, e.g., KFAX, KGBS, and KXL (Case No. 17,498, R. 3870-3947).

1030 kc (10 kw, U, with a right to increase power to 50 kw by protecting WBZ), and (assertedly) a 50 kw construction permit on 1180 kc (R.\* 225, J.A. 48).

Notwithstanding subsequent assurances by the Commission, in response to objections interposed by WABC (J.A. 57-59) and in connection with ABC's taking over the Blue Network (J.A. 127), that KOB's operation on 770 kc was a "temporary" measure, unavoidable in view of the war-time freeze on construction, KOB filed an application (BMP-1738) on February 3, 1944, for a modification of its previously issued construction permit on 1180 kc and for a regular license to operate non-directionally with 50 kw on 770 kc, accompanied by a petition to "break-down" 770 kc to permit two unlimited-time Class I stations thereon (J.A. 57, 62-64). That application was subsequently designated for hearing (Docket 6584) without making ABC a party thereto (R.\* 416-418).<sup>1</sup> A then-pending application by Station KXA, Seattle, Wash. for nighttime rights on 770 kc and an application by ABC on behalf of Station KECA (now KABC), Los Angeles, Calif. for authority to operate unlimited time on 770 kc were not consolidated therewith for comparative consideration (R.\* 470, 553-554).<sup>2</sup> ABC and KXA were, however, subsequently permitted to intervene (R.\* 430, 470). A hearing on KOB's applications (but not on those of KXA or KABC) was held in January 1945, with the issues in that hearing restricted solely to engineering matters (R.\* 489-491; cf. 12 RR 583, 584-585).

<sup>1</sup> In retrospect, in view of the then recent decision of this Court and the Supreme Court in Federal Communications Commission v. National Broadcasting Company (KOA), 319 U.S. 239 (1943), the Commission's failure to make ABC a party to the hearing on its own motion seems almost unbelievable.

<sup>2</sup> Although the Ashbacker case (which subsequently gave its name to the doctrine that mutually exclusive applications must receive comparative consideration) was yet to arise, this Court had already issued warnings on this score. Symons Broadcasting Co. v. Federal Radio Commission, 62 U.S. App. D.C. 46, 64 F.2d 381 (1933).



Some five weeks later (on February 20, 1945), on the ground that the policy questions (engineering, social and economic) involved in applications for the breakdown of clear channels could be more appropriately considered in an overall rule-making rather than in an ad hoc adjudicatory proceeding, the Commission instituted its so-called Clear Channel Proceeding (Docket 6741) and thereafter dismissed all applications then pending for such breakdowns (J.A. 76-78) — except the application of KOB, which was placed in the pending file (1 RR 53: pp. 903, 905; J.A. 88).

After it became apparent that the Clear Channel Proceeding was not to be promptly resolved, ABC formally objected to the continuing operation of KOB on 770 kc and the resulting loss of some 23 million listeners caused by KOB's nondirectional nighttime operation with 25 kw on 770 kc (J.A. 86-90, 96-99). Following denial by the Commission of those objections,<sup>1</sup> this Court in 1951 reversed (Case Nos. 10,496 and 10,570), on the ground that the pendency of the Clear Channel Proceeding, with no prospect of an immediate decision therein, was not a valid excuse for the prolonged continuation of the interference which KOB was causing WABC. This Court made it clear that a temporary or interim solution should be found, with all deliberate speed, even though the subsequent conclusions in the Clear Channel Proceeding might thereafter dictate a different result. American Broadcasting Co. v. Federal Communications Commission, 89 U.S. App. D.C. 298, 306, 191 F.2d 492 (1951).

Some fourteen months thereafter the Commission removed from its pending files, as a vehicle for a temporary solution thus ordered by this Court, the stale record in Docket 6584 (R.\* 2444-2448). Almost three years later, on May 26, 1955, the Commission ordered that record updated and expanded to include an engineering showing on 1030 kc (on

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<sup>1</sup> ABC was there told by the Commission that "a final determination with respect to a permanent assignment for Station KOB can best be made after a final decision in the Clear Channel Hearing" (J.A. 95); and that the question of KOB's "permanent assignment . . . cannot be determined until after a decision in the Clear Channel Hearing" (J.A. 172). Although in accord with those assertions, ABC did object to the Commission's refusal to return KOB in the interim to its duly licensed frequency of 1030 kc (R.\* 2292-2295; J.A. 96-99, 450).



which KOB is duly licensed) and data on certain non-engineering matters (12 RR 583).<sup>1</sup> Following a second appeal (Case No. 12883) by ABC from Commission action allowing KOB in the interim to continue its nondirectional nighttime operation on 770 kc, this Court on September 27, 1956, directed the Commission within sixty days to take effective steps "substantially to relieve the present illegal impingement upon the existing license of Station WABC". American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission, Case No. 12883, 14 RR 2020 (U.S. App. D.C. 1956). Pursuant to that mandate and subsequent Commission orders, duly reported to this Court,<sup>2</sup> KOB directionalized its nighttime operation in April 1957 (770 kc, 50 kw-D, 25 kw-N, DA-N) to protect ABC's present nondirectional 0.5 mv/m 50% skywave countour.<sup>3</sup>

On April 15, 1958, after the record in the further hearing in Docket 6584 had already been closed, the Commission reactivated the Clear Channel Proceeding (Docket 6741) — by a Second Notice which proposed to place two Class I directionalized operations on several Class I-A channels,

<sup>1</sup> Throughout the further hearing thus ordered in 1955 in Docket 6584, various requests to expand the scope of that proceeding to include certain additional Class I-A frequencies and additional non-engineering matters were denied by the Commission on the premise that that proceeding was narrowly limited in purpose (to carry out this Court's 1951 mandate by finding a temporary berth for KOB, pending a permanent solution of the KOB "problem" in the Clear Channel Proceeding), and should not be allowed to degenerate into a miniature clear channel hearing (12 RR 583, 586, para. 7; 13 RR 861, 868, para. 10; J.A. 541).

<sup>2</sup> The Commission's letter (with a copy to this Court) of November 8, 1956, directing KOB to directionalize in conformity with this Court's action of September 27, 1956 (Case No. 12883, 14 RR 2020) contained the following express caveat: "We wish to emphasize that the temporary operation will not prejudice in any way the future consideration by the Commission in connection with a permanent solution of this matter and that any operation on the frequency 770 kc will not be considered by the Commission in any future determination as to the status of the frequency 770 kc as a Class I-A clear channel frequency, or the permanent status of Station WABC as a Class I-A clear channel station. Any determination as to the permanent resting place of KOB, or as to whether any of the present clear channels, including 770 kc and 1030 kc, should be permanently broken down will be made solely on the basis of the record in proceedings looking toward the permanent solution to this problem."

<sup>3</sup> KOB has continued to so operate as a Class II unlimited-time station on 770 kc (50 kw-D, 25 kw-N, DA-N) by virtue of special authorizations, while at the same time having its regular license renewed on 1030 kc (10 kw, U), the last such renewal being for the period ending October 1, 1965.

and which indicated for the first time that a permanent solution of WABC-KOB controversy and the use to be made of 770 kc would be arrived at in Docket 6584 rather than in Docket 6741.<sup>1</sup>

By a Decision and Order released September 5, 1958, in Docket 6584 (25 FCC 683, 805), the Commission concluded, notwithstanding the loss to WABC of some 15 million listeners, that the frequency 770 kc should be broken down to permit two unlimited time 50 kw Class I operations thereon, with each directionalized to protect the other — action in line with the Second Notice of April 1958 in Docket 6741 wherein the Commission had proposed similar action with respect to four other Class I-A channels (including those licensed to NBC and CBS in New York City). The proceedings in Docket 6584 were ordered "to remain open for the purpose of considering further adjudicatory matters" in connection with permission granted<sup>2</sup> KOB and WABC to submit applications requesting specified directional patterns (25 FCC 683, 794, para. 57).<sup>3</sup>

From the concurrently issued Order amending its rules to "permit" two Class I operations on the frequency 770 kc (25 FCC 805), ABC again appealed to this Court (Case Nos. 15399 and 15400). In its brief in those cases, filed in February 1960, ABC complained that it had been prejudiced by being buffeted between the Clear Channel Proceeding (Docket 6741) and the KOB proceeding (Docket 6584) on the matter of the future use to be made of 770 kc, pointing out (a) that the pendency of each proceeding had in turn been used as an excuse for not considering in either other possible frequencies for KOB, and (b) that in September 1958, when the Commission ordered WABC to directionalize and to share its 770 kc frequency

<sup>1</sup> For the text of the Second Notice, see the printed joint appendix in Case No. 17,498 (J.A. 10, 43-45, paras. 71-73). The text of the Second Notice was also reprinted in full as Appendix A to ABC's opening brief in case Nos. 15,399 and 15,400.

<sup>2</sup> This action was apparently intended by the Commission as a substitute for the "show cause" procedure previously promised (see 13 RR 873, para. 22).

<sup>3</sup> With the Clear Channel Proceeding reactivated, with this Court's earlier mandates carried out, and with KOB substantially protecting WABC's 0.5 mv/m 50% skywave contour, ABC urged the Commission, but to no avail, that any further proceedings in Docket 6584 be held in abeyance pending a final decision in the Clear Channel Proceeding (see R.\* 7442-7486, J.A. 833).

with KOB in Docket 6584 (25 FCC 683), the Commission was proposing (by its Second Notice of April 1958 in Docket 6741) to take identical action in the Clear Channel Proceeding with respect to the flagship operations of NBC and CBS on 660 kc and 880 kc in New York, whereas by a Third Notice issued in the Clear Channel Proceeding (Docket 6741) in September 1959, a year after the KOB case had been decided, the Commission had concluded, because of skywave dislocations in the east, to repudiate the dual Class I approach which it had suggested in its Second Notice and not to require NBC, CBS, and certain other eastern clears to directionalize their existing operations (for the text of the Third Notice, see Case No. 17,498, J.A. 130, 132-133, para. 7; see also Appendix B to ABC's opening brief in Case Nos. 15,399 and 15,400).<sup>1</sup> As a result of this buffeting procedure and changes in allocation philosophy, ABC pointed out that it was about to end up with flagship facilities for its radio network distinctly inferior to those of CBS and NBC, in large part because 770 kc had been severed from the proceedings in Docket 6741, and because the proceeding in Docket 6584, after the record had been closed, had been transformed from a proceeding to carry out this Court's 1951 mandate into a proceeding to determine a permanent facility for KOB.

Apparently in partial recognition of these particular contentions (there admittedly premature with no final decisions yet issued in either Dockets 6584 or 6741), and though concluding that the Commission did not err "in not assigning KOB to 1030 kc", this Court went on to state in its decision of May 27, 1960 (American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission, 108 U.S. App. D.C. 83, 87-88, 280 F. 2d 631):

At the same time, we do not think that the position of ABC as a network should be permanently prejudiced by forcing it to share a channel if other networks are given full use of clear channels. This inequity, if it exists or is permitted to

<sup>1</sup> Instead of breaking down the clears for two Class I operations each protecting the other, the Commission in its Third Notice of 1959 proposed a Class II operation on each broken down clear, so directionalized as to protect the present 0.5 mv/m 50% skywave contour of the existing dominant Class I-A station, none of which were to be required to directionalize (see Case No. 17,498, J.A. 130, 136-138, 140, paras. 13-15 and Table I). As will be emphasized hereafter, ABC is prepared to acquiesce in a break down of 770 kc and its use in a similar fashion by KOB.

exist, should be cognizable by the Commission in a proper proceeding brought before it by ABC, even though the assignment of KOB to 770 kc is permitted to continue. In other words, the Commission should seek to provide channel facilities to the ABC network on a basis which is fair and equitable in comparison with other networks. Whether this is to be done by permitting ABC to intervene in the clear channel proceedings now pending, or through some other means, is not for us to say. It may be that ABC can raise its claims in this regard by filing competitive applications when present licensees on other frequencies seek renewal or by seeking modification of existing licenses held by others. Perhaps the Commission will afford, sua sponte, some other procedural remedy. Thus, we do not believe that ABC has been or should be precluded from a hearing on its claim that the public interest requires that the loss of service in the East, which Class I broadcasting from Albuquerque produces, be absorbed by some eastern broadcaster other than WABC. Any failure by the Commission to give due consideration to ABC's claims for treatment comparable to that accorded to other networks, when raised in an appropriate manner, may be brought to the courts for review.

For these reasons, and on the basis stated, we affirm the Commission's Order. We need not and do not pass on any contentions of the parties not here discussed.

So ordered.

Some fourteen months later, with ABC having in the meantime filed for renewal of its long-held nondirectional license on 770 kc in New York City, with Hubbard having amended BMP-1738 to request directional Class I operation on 770 kc in Albuquerque,<sup>1</sup> and with Hubbard having also filed an application for WABC's facilities in New York City (specifying directional rather than nondirectional operation thereon), the Commission decided to wind up the unfinished aspects of the adjudicatory proceedings in Docket 6584, and at the same time to take care of the admonitions contained in this Court's 1960 opinion (R. 7-14). Curiously enough, because taken in advance of the release of a final report in the Clear Channel Proceeding (Docket 6741) stating precisely what was to be done with the flagship operations of NBC and CBS in New York, the Commission by a

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<sup>1</sup> Both these applications had been filed in response to the 1958 decision (25 RR 683, 794, para. 57; cf. Tr. 35; see also 31 FCC 595, para. 83).

Memorandum Opinion and Order adopted July 27, 1961, directed a "further hearing" in Docket 6584 on KOB's amended application and WABC's non-directional renewal on the question "whether the consideration of providing facilities to the ABC Network in New York on a basis which is fair and equitable in comparison with other radio networks should vary the conclusion" reached in 1958 that WABC should directionalize and share its frequency with KOB (R. 7-14).<sup>1</sup>

On September 14, 1961, after a prehearing conference to delineate the scope of the further hearing ordered six weeks earlier in Docket 6584 had been held (Tr. 1-31), the Commission released its Report and Order in the Clear Channel Proceeding (Docket 6741), wherein the Commission (a) abandoned the dual Class I approach on all 25 Class I-A channels other than 770 kc (31 FCC 565, 574, para. 23); (b) left NBC's New York frequency (660 kc) in status quo, with no provision for its duplication in the 48 contiguous states (31 FCC 565, 576, para. 29); (c) required the Class II-A stations which it authorized in the west on 11 of the 25 Class I-A channels (including CBS's 880 kc channel) to protect the existing primary and secondary service of each of the dominant Class I-A facilities, none of which was to be required to directionalize (31 FCC 565, 577, 604); and despite the fact that a "further hearing" in Docket 6584 had been ordered on that very point only six weeks previously, (d) reaffirmed its 1958 KOB decision providing for two Class I directional operations on 770 kc (31 FCC 565, 597, para. 90). From this last-mentioned pronouncement in the Clear Channel Decision, ABC filed in this Court a petition for review (Case No. 17,567), which was held in abeyance pending the results of the "further hearing" in Docket 6584.

At that "further hearing", after the Commission had refused to expand the issues to include other "Eastern clears" which this Court had

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<sup>1</sup> Elsewhere in that order (R. 13), in explanation of its refusal to include Hubbard's application for directional operation on 770 kc in New York City, the Commission stated that consideration would be given, in the event the 1958 result was adhered to, of allowing ABC an opportunity to seek directionalized operation on 770 kc, and of then being accorded an Ashbacker hearing with Hubbard's application for WABC's New York facilities. Appeals by Hubbard from the Commission's refusal to include Hubbard's New York application (filed in February 1960) in the "further hearing" thus ordered in Docket 6584 (begun in 1944) were subsequently dismissed by this Court at the request of the Government as premature (Case Nos. 16,577 and 16,578).



mentioned as a possible approach in its May 27, 1960 opinion (R. 35-36; 998-1008), ABC adduced uncontradicted engineering evidence showing that the New York flagship stations for each of the three principal radio networks (ABC, CBS, and NBC) presently serve some 42,000,000 persons; that under the Clear Channel Decision (Docket 6741) NBC's and CBS's flagship stations will continue to serve some 42,000,000 persons, whereas WABC's coverage (under the 1958 decision in Docket 6584) would be reduced to 24,000,000 persons; that the area and population which ABC would thus lose, if WABC directionalized, already receive fewer services from ABC owned or affiliated stations than they receive from CBS and NBC owned or affiliated stations, with the ABC network thus less able to bear coverage losses of that magnitude; that some 850,000 persons who presently receive a primary service from WABC (in some instances within forty miles of New York City) will hereafter be dependent on an intermittent skywave service by a single station (that of WLS in Chicago) for the program service provided by the ABC radio network; and that almost 16,000,000 persons (of whom 5,667,000 are without any primary service) will hereafter be dependent on intermittent skywave service from 0-2 (rather than 1-3) stations for the programs of the ABC radio network, whereas those same people will continue to have from 5-9 and 3-10 skywave services by which to receive the programs of the CBS and NBC radio networks (see 35 FCC 36).

Proffered engineering evidence (R. 116-119, 138, 139-149) designed to contrast the minimal gains by KOB in the west with the substantial losses suffered by ABC in the east, showing that the additional 67,000 people to whom KOB would provide a first primary service nighttime, if WABC directionalized and curtailed its service in the east by almost 18 million persons, already receive eight skywave services from stations affiliated with the same network as KOB (NBC), and that the 1,250,000 persons presently without a nighttime primary service to whom KOB would thus provide an additional skywave service already receive from



2-11 other secondary services, was excluded (see 35 FCC 36, 42).<sup>1</sup>

On the record in that hearing and in subsequent pleadings (Tr. 353-354, 794-801), ABC indicated its willingness, in order to bring the KOB litigation to an end, to acquiesce in a breakdown of 770 kc and the dual utilization of that frequency in the same fashion as that ordered on 11 of the 25 Class I-A channels in Docket 6741, including that of CBS (namely, the duplication of the eastern clears by a Class II-A station in the west, protecting the existing nondirectional 0.5 mv/m 50% skywave contour of the dominant station).

In an Initial Decision released May 29, 1962 (R. 421-458), the Examiner misconstrued (and in one instance rejected) uncontradicted engineering data, denied WABC's renewal, and volunteered the opinion that had the record contained certain showings the 1958 result should indeed be "varied" (35 FCC 36, 57, Fdg. 38). In exceptions thereto ABC showed that the undisputed engineering data, which he had misunderstood, in fact met the very tests he there laid down (see R. 760-774).

In a Decision released July 8, 1963 (35 FCC 36, 43; R. 502-510), the Commission agreed that the Examiner had misconstrued the engineering data of record and excised from the Initial Decision the findings in question (paras. 45, 46, 49-51, 53, 54, 56-58, and 69-75). Elsewhere, however, it approved the Examiner's rejection of proffered data (see Exception 31, R. 730-733) delineating the minimal gains of KOB in the west in contrast with the substantial losses suffered by ABC in the east (35 FCC 43), and adhered to its 1958 conclusion requiring WABC to directionalize and to forego some 18,000,000 listeners, even though as a result of the Clear Channel Decision both NBC and CBS continue to enjoy "full utilization" of their flagship channels in New York City (35 FCC 36). It ignored ABC's offer (Tr. 353-354; R. 794-801) to acquiesce in a breakdown of 770 kc (and its utilization by KOB) in a fashion identical with that

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<sup>1</sup> Of the 1,250,000 persons to whom KOB would thus provide a skywave service, all but 20,000 receive 4-11 other secondary services, including several from stations likewise affiliated with NBC. The 20,000 who are presently limited to 2-3 skywave services will shortly receive primary service from Class II-A stations assigned to Idaho and Montana in Docket 6741.

ordered on eleven Class I-A frequencies in the Clear Channel Decision (i.e., with KOB protecting WABC's present 0.5 mv/m 50% skywave contour).

The Commission accordingly (1) granted Hubbard's application for directionalized Class I operation by Station KOB on 770 kc in Albuquerque, N. Mex. (770 kc, 50 kw, U, DA-N), and (2) denied ABC's application for renewal of WABC's long-held license for nondirectional operation on 770 kc in New York City (770 kc, 50 kw, U), "without prejudice to reconsideration" if ABC filed, within a specified period, an application for modification of facilities on the frequency 770 kc in conformity with the parameters specified in paragraph 22 of the September 1958 decision (35 FCC 36, 42).

On August 7, 1963, ABC filed a timely notice of appeal from that portion of the July 8 Decision granting KOB Class I rights on 770 kc and denying WABC's application for renewal of its nondirectional operation on 770 kc (Case No. 18,046). On that same date Hubbard likewise appealed from and thereafter filed a petition to review those portions of the July 8 Decision indicating that ABC would be afforded an opportunity to request directionalized operation on 770 kc in New York (Case Nos. 18,045 and 18,078). Both ABC and Hubbard have since cross-intervened in the appeals of the other.

Thereafter, the four appeals were duly consolidated by order of this Court. A motion by ABC, joined in by the Government, to dismiss Hubbard's appeals on jurisdictional grounds (as no less premature than the earlier appeals which this Court dismissed in Case Nos. 16,577 and 16,578) was postponed to the merits by Orders of October 1, 1963. A prehearing stipulation regarding the issues and the printing of the record was approved by this Court on October 16, 1963.

#### RULES INVOLVED

Pertinent provisions of the Commission's Rules as worded at the times here relevant are set forth in Appendix A hereto.

## STATEMENT OF POINTS

1. The Commission's actions, in repeatedly shunting ABC (in its efforts to protect its interests on 770 kc) from one to the other of two concurrently conducted proceedings (Docket 6584 and Docket 6741), in several instances after the record in the proceeding to which the "fate" of 770 kc was relegated had already been compiled, was illegal, arbitrary, prejudicial, and a denial of due process of law.

2. Insofar as the Commission by its decisions in the Clear Channel Proceeding (Docket 6741) purports to reaffirm its 1958 decision in Docket 6584 to permit two Class I operations on 770 kc (31 FCC 515, 597, para. 90), said action by the Commission is inconsistent with other paragraphs of its Clear Channel Decisions (31 FCC 565, 595, para. 85) and such inconsistencies if permitted to stand defeat petitioner's right of judicial review.

3. Insofar as the Commission by its decisions in the Clear Channel Proceeding (Docket 6741) purports to reaffirm its 1958 decision in Docket 6584 to permit two Class I operations on 770 kc (31 FCC 597, para. 90), said action illegally prejudged matters to be resolved in the then pending adjudicatory proceeding in Docket 6584 instituted pursuant to this Court's opinion in 108 U.S. App. D.C. 83, 87-88, and thus defeats administrative relief there contemplated by this Court.

4. In authorizing in 1963 a second Class I operation on 770 kc, in Docket 6584, after having repudiated that mode of utilizing the other clears, and more particularly those licensed to ABC's principal radio network competitors (CBS and NBC), the Commission acted arbitrarily, capriciously, illegally and in contravention of the public interest and this Court's opinion and mandate in Case Nos. 15,399 and 15,400 (108 U.S. App. D.C. 83, 87-88).

5. The Commission, in requiring any second stations authorized on the remaining clears to fully protect the existing 0.5 mv/m 50% skywave contours of the dominant stations (including NBC's and CBS's flagship

operations in New York on 660 kc and 880 kc), while requiring WABC to directionalize and to forego some 18,000,000 persons within its present service area, acted arbitrarily, capriciously, illegally and in contravention of the public interest and this Court's decision and mandate in Case Nos. 15,399 and 15,400 (108 U.S. App. D.C. 83, 87-88).

6. The disparate treatment accorded the ABC radio network and its New York flagship operation (in Dockets 6584 and 6741) vis-a-vis that accorded its two major competitors (in Docket 6741) was arbitrary, illegal, prejudicial and contrary to the public interest.

7. The Commission's rejection of proffered data designed to contrast the minimal public interest gains by KOB in the west with the substantial public interest losses by WABC and the ABC radio network in the east was illegal and arbitrary.

8. The Commission's action requiring WABC to directionalize and to reduce its primary coverage by some 700,000 persons and its secondary coverage by some 17,200,000 persons, in an area largely dependent on a limited number of skywave signals for the program service of the ABC radio network, in order to provide some 67,000 additional persons in New Mexico with a first primary nighttime service (though already receiving 8-11 skywave services from other stations, several of which are affiliated with the same network as KOB), after having refused to require other eastern clears to directionalize and suffer like coverage curtailment in order to provide a first primary service in other Rocky Mountain states equally in need of such service, with no private equities here involved, was arbitrary, capricious, illegal, and contrary to the public interest and to the 1960 decision of this Court in Case Nos. 15,399 and 15,400.

9. The Commission's rulings on ABC's exceptions to the Initial Decision, to the extent there rejected, were erroneous, contrary to the record, and prejudicial.

10. In any event, the action here appealed from (and prior orders and rulings culminating therein) breaking down 770 kc, requiring WABC to directionalize, and permitting KOB to operate as a Class I station thereon, taken after similar approaches on other clears were rejected in Docket 6741, was arbitrary, capricious, contrary to the law and evidence, and violative of the public interest in the following particulars:

(a) In refusing to consider clears other than 770 kc as an operating frequency for KOB, and more particularly 660 kc and 880 kc (with the instant record showing a greater adverse impact on the ABC radio network and the listening public than similar action on NBC's and CBS's flagship channels), and 1180 kc (for which KOB had a 50 kw permit when the KOB problem arose and from which a modification to 770 kc is here sought);

(b) In singling out 770 kc and making ABC bear the entire burden of providing a solution to the so-called KOB problem, arising out of matters for which WABC was in no way responsible;

(c) In not bringing its 1958 action on 770 kc, taken at a time when similar action was contemplated on other clears (including those of NBC and CBS), into line with its overall action in the Clear Channel Proceeding in 1961, particularly since the present licensee of KOB has no private equities or grandfather rights on 770 kc, 1180 kc, or other Class I-A clears, and the people of New Mexico no claim to special treatment over that accorded the residents of the other Rocky Mountain states in Docket 6741.

#### SUMMARY OF ARGUMENT

1. Each of the flagship stations for the three principal radio networks (WABC, WCBS, and WNBC) presently provide a primary and secondary service to some 42,000,000 persons. Notwithstanding the action taken in the Clear Channel Proceeding, WNBC and WCBS will continue to serve some 42,000,000 persons (35 FCC 36, 39, para. 3), and their respective frequencies (660 kc and 880 kc) remain eligible for



superpower (750 kw). See The Goodwill Stations, Inc. v. Federal Communications Commission, Case No. 17,498, Slip Op. pp. 6, 13 (decision of October 31, 1963). However, under the actions here challenged, granting KOB Class I status on 770 kc, WABC's primary and secondary coverage will be reduced by 18,000,000 persons, with superpower out of the question on a channel occupied by two Class I stations.

Even at present the areas and populations which WABC would thus lose receive fewer services from ABC than from CBS and NBC owned and affiliated stations. Under the actions here challenged, some 850,000 of the 976,000 persons to whom WABC would cease to provide a primary service would hereafter be dependent on the intermittent and fluctuating skywave signal of a single station (WLS) for the meritorious program service provided by the ABC radio network. Almost 16,000,000 of the 17,200,000 persons to whom WABC would cease to provide a secondary service (of whom 5,667,000 are without a primary service of any kind) would hereafter be dependent on intermittent and fluctuating skywave signals of 0-2 stations for the programs of the ABC network, whereas this loss area will as heretofore have 5-9 and 3-10 skywave signals by which to receive the programs of the CBS and NBC radio networks. With the ABC network even at present operating at a competitive disadvantage vis-a-vis its two principal competitors, by reason of poorer nighttime coverage (both primary and secondary), such losses will handicap still further ABC's competitive position vis-a-vis CBS and NBC.

In thus requiring ABC to share its flagship channel while according to CBS and NBC the full use of their New York clears to the extent of their present usable service, the Commission has disregarded the 1960 directive of this Court in 108 U.S. App. D.C. 83, 87-88, and has not provided channel facilities to the ABC radio network on a basis which is fair and equitable in comparison with other networks.

2. In failing to rectify in 1963 the inequity which it needlessly created in 1958 and 1961, the Commission ignored the evidence of record, the 1960 mandate of this Court, and the public interest. In 1963 the



Commission knew, what it did not in 1958, that none of the other 24 Class I-A stations, because of "substantial dislocations" not fully compensated for by new operations, were not being ordered to directionalize or curtail coverage so that new stations in the Rocky Mountain area could thereby provide additional primary and secondary service. In 1963 the Commission knew, what it did not in 1958, that the shortage in skywave signals in the west was to be solved, if at all, by superpower operations on 12 untouched clear channels, and not by curtailment (through directionalizing) the coverage of existing operations on eastern clears. In 1963 the Commission knew, what it did not in 1958, that if WABC directionalized, more than 16 million people would hereafter be dependent on 0-2 intermittent and fluctuating skywave signals for the meritorious program service provided by the ABC radio network, meaning that those 16,000,000 people would have no means of receiving the program service of that network at night whenever KXEL or WLS (because of other commitments, talent conflicts, or not being ordered by the sponsor) did not carry particular ABC network feeds. In 1963, unlike in 1958, the Commission was under a duty to consider a 1960 directive of this Court to provide channels to the networks on a fair and equitable basis, with ABC not to be forced to share a channel if other networks were given full use of their clears.

In the light of these intervening considerations, with no countervailing evidence submitted by either Hubbard or the Bureau, the Commission's refusal in 1963 to "vary" a conclusion which was admittedly "close" in 1958 was erroneous.

3. If KQB were to operate as a Class II-A facility on 770 kc, the foregoing substantial losses which WABC, the ABC radio network, and some 18 million persons would suffer from KOB's operating as a Class I station would not arise. The public interest gains in the west, from KOB's operating as a Class I rather than a Class II-A station on 770 kc, when compared with those losses, are small — a first primary service by KOB to an additional 67,000 persons at night (with those 67,000 persons

already receiving 8-11 skywave services from the same network with which KOB is affiliated), and a secondary service to 1,250,000 persons, who (though lacking a primary service) have 2-11 and for the most part 4-11 other skywave services.

Bearing in mind that more primary and secondary service would have been afforded the west if the eleven eastern clears on which Class II-A operations were authorized in Docket 6741 had likewise been required to directionalize to accommodate Class I stations thereon, the Commission has nowhere explained why the needs of New Mexico for an additional primary service are so pressing that they must be given a Class I facility, whereas the other Rocky Mountain states with corresponding white areas must be content with Class II-A operations. Nowhere has the Commission explained why the Rocky Mountain states are so desperately in need of an additional skywave service that 770 kc must be broken down, with the aforementioned attendant consequences, whereas that need is not such as to require any of the other 24 Class I-A channels to be so broken down.

In short the public interest, the evidence of record, and this Court's 1960 mandate require that 770 kc be broken down in the same fashion as the other eleven channels on which Class II-A facilities have been authorized, thus restoring channel equality to the flagship stations of the three principal radio networks.

#### ARGUMENT

In its brief in 1960 in Case Nos. 15,399 and 15,400, ABC emphasized to this Court that, as a result of being buffeted back and forth between Dockets 6584 and 6741,<sup>1</sup> with the future use of 770 kc being determined in

<sup>1</sup> That the "buffeting" thus complained of in 1960 has since persisted is borne out by the Clear Channel Decision of September 13, 1961 (31 FCC 565). Though belatedly told in April 1958 that the future use of 770 kc was to be determined in Docket 6584 rather than in Docket 6741, and though a further hearing had been ordered in Docket 6584 in July 1961 to ascertain whether the 1958 result should be "varied" (R. 7-14, Issue 2), the Commission in its Clear Channel Decision (Docket 6741) released six weeks later stated: "... we hereby affirm our KOB decision insofar as it has been determined that a major unlimited time facility should be assigned to New Mexico on 770 kc and amended rules to permit two Class I stations on that frequency" (31 FCC 597, para. 90; cf. 31 FCC 574, para. 23, fn. 4; 31 FCC 575, para. 24; 31 FCC 577, para. 31; 31 FCC 587, para. 63, fn. 8). See Statement of Points, Nos. 1-3, supra.

Docket 6584 on the basis of concepts since discarded in Docket 6741, ABC was about to end up with flagship facilities for its radio network distinctly inferior to those of CBS and NBC. In its subsequently issued opinion in those cases, this Court (with the foregoing contentions admittedly premature at that juncture) made it abundantly clear, even though it there affirmed the Commission's refusal to return KOB to 1030 kc, that no such untoward consequences were there being sanctioned. American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission, 108 U.S. App. D.C. 83, 87-88, 280 F.2d 631 (May 27, 1960).

There this Court concluded, provided the proceedings were otherwise free of error and that somewhere along the line other matters were duly considered, (a) that the Commission could in 1958 transform Docket 6584 from one to find a temporary berth for KOB into a proceeding to find "a solution of a more permanent nature" (p. 86); (b) that the Commission, so as "not to overlap" the then pending Clear Channel Proceeding, had not abused its discretion in limiting to two frequencies (770 kc and 1030 kc) the further hearing which it had ordered in 1955 in Docket 6584 (p. 87); and (c) that with respect to the "more difficult problem" presented by ABC's second contention (p. 87)<sup>1</sup> it could not be said "that the Commission erred in not assigning KOB to 1030 kc" (p. 87). This Court then carefully added these explicit warnings (pp. 87-88):

At the same time, we do not think that the position of ABC as a network should be permanently prejudiced by forcing it to share a channel if other networks are given full use of clear channels. This inequity, if it exists or is permitted to exist, should be cognizable by the Commission in a proper proceeding . . . In other words the Commission should seek to provide channels to the ABC network on a basis which is fair and equitable in comparison with other networks . . . Any failure by the Commission to give due consideration to ABC's claims

<sup>1</sup> Elsewhere this Court summarized that contention as follows (p. 86): "Second, it complains of the failure of the Commission to accept ABC's proffered evidence on various matters connected with its position as a network, and particularly the claim that to divide 770 kc with KOB would seriously affect the operations of WABC, the ABC network's 'flagship' station, and would thus place the ABC network at a competitive disadvantage vis-a-vis the other two large networks, National Broadcasting and Columbia Broadcasting."

for treatment comparable to that accorded to other networks, when raised in an appropriate manner, may be brought to the courts for review.

Thus, if we read this Court's 1960 decision aright, the Commission was explicitly told that "the position of ABC as a network should not be permanently prejudiced by forcing it to share a channel [in Docket 6584] if other networks are [subsequently] given full use of clear channels [in Docket 6741]." The Commission was further told that it should, in the Clear Channel Proceeding, sua sponte, or otherwise, "seek to provide channel facilities to the ABC network on a basis which is fair and equitable in comparison with other networks."

Thereafter, in a Memorandum Opinion and Order adopted July 27, 1961, the Commission decided sua sponte to order a "further hearing" in Docket 6584 for two purposes (R. 7-14): First, to wind up those aspects of that proceeding left unfinished in 1958 (arising from the submission of WABC's renewal and KOB's directionalized proposal); and at the same time (R. 12, para. 11) to use that proceeding as a vehicle to take care of the matters raised by this Court in its May 27, 1960 Opinion (108 U.S. App. D.C. 83, 87-88).

The issues, as there framed by the Commission, were apparently designed to elicit evidence by which to determine two questions (35 FCC 53, para. 28, R. 433): (1) Whether the Commission, in its 1958 decision in Docket 6584 on the one hand and in its 1961 decision in Docket 6741 on the other,<sup>1</sup> is providing facilities to the ABC network in New York on a basis which is fair and equitable in comparison with other networks, and if not, (2) whether that fact should "override" or "vary" the conclusion

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<sup>1</sup> When the Commission ordered the further hearing in Docket 6584 (July 27, 1961), no final decision had yet been issued in Docket 6741 (September 13, 1961). However, in June of 1961 the Commission had publicly announced its tentative conclusions in Docket 6741 — to place Class II-A (not Class I) stations on certain clears, with the Class II-A protecting the dominant station, and to hold the other clears in reserve for similar breakdowns or for superpower at a later date. Thus, it was apparent from the July 1961 Order that the Commission had decided not to use the then pending Clear Channel Proceeding as a means of providing the

(Footnote continued on following page)

reached by the Commission in September 1958 to permit two Class I operations on 770 kc (R. 12-14).<sup>2</sup>

<sup>1</sup> (Footnote continued from preceding page)  
networks with comparable facilities (one of the possible approaches which this Court had suggested in 1960). Comparable facilities could have been provided in Docket 6741 in either of two ways: By reverting to the Second Notice and providing for dual Class I utilization on 660 kc (WNBC) and 880 kc (WCBS) as well as 770 kc (WABC); or by requiring that any new station on 770 kc, no less than those on 660 kc and 880 kc, protect the existing 0.5 mv/m 50% skywave of the dominant station. Had the Commission taken either course, ABC could no longer have complained of any unequal treatment and no further hearing would have been required.

<sup>2</sup> Since the Commission's action in ordering a further hearing in Docket 6584 was taken *sua sponte* (an alternative which this Court had suggested), for the expressed purpose of carrying out this Court's 1960 admonitions, and knowing that if the network inequality was not rectified in the proceeding thus ordered, the matter would to all intents and purposes be deemed *res judicata*, ABC attempted to expand the issues to include certain "other Eastern clears," such as 660 kc, 880 kc, and 1180 kc (R. 998-1008), in line with an explicit suggestion of this Court (108 U.S. App. D.C. 83, 87). WHAM's frequency of 1180 kc was included in that motion for three reasons: (1) because this Court had spoken of the possibility of WABC's losses east of the Mississippi being "absorbed by some eastern broadcaster other than WABC," (2) because 1180 kc was the frequency by virtue of which KOB claimed pre-NARBA Class I rights and for which a modification was being sought in Docket 6584 (BMP-1738); and (3) because the Commission in its Third Notice in Docket 6741 had proposed to place a Class II station thereon in the Rocky Mountain area, with WHAM stating that it had no objection thereto so long as WHAM's 0.5 mv/m 50% skywave contour was protected.

The Commission summarily brushed off ABC's request that other frequencies be considered (R. 35-36), on the ground that this Court had affirmed the Commission's 1958 action restricting the 1955 further hearing in Docket 6584 to two frequencies, with Docket 6741 then undecided. The Commission thus failed to recognize (a) that it had in the meantime in Docket 6741 done precisely what this Court had warned against (i.e., that ABC should not be required to share a channel if other networks were given full use of their channels), and (2) that having created that inequity it was under a mandate of this Court, in the proceeding professedly ordered for that purpose *sua sponte*, to rectify that inequity — either by according ABC greater rights on 770 kc or by considering other "Eastern clears." That this Court, in 1960, with the Clear Channel Proceeding still pending, had sanctioned the Commission's action restricting the 1955 further hearing to two frequencies did not mean that other frequencies were not germane in a subsequent proceeding expressly ordered for the purpose of rectifying an inequity which the Commission had permitted to arise in the Clear Channel Proceeding. See Statement of Points Nos. 9 and 10, *supra*.



**I. Contrary to This Court's Admonitions in 1960, the Commission Has Not Provided Facilities to the ABC Radio Network on a Basis Which Is Fair and Equitable in Comparison With Other Networks<sup>1</sup>**

That the Commission, in requiring ABC to share a channel while according to CBS and NBC the full use of their clears, has not provided channel facilities to the ABC network on a basis which is fair and equitable in comparison with other networks seems too clear to admit of argument.

A. Engineering Facts of Record. — The engineering evidence of record is undisputed<sup>2</sup> that, with WABC operating pursuant to its long-held license (770 kc, 50 kw, U) and with KOB substantially protecting WABC's 0.5 mv/m 50% skywave contour as required by this Court's Order of September 27, 1956 (14 RR 2020) and by the Commission's action of December 10, 1956 (770 kc, 50 kw day, 25 kw night, DA-N), WABC presently provides an interference-free primary groundwave service at night<sup>3</sup> to an area of 19,270 square miles and a population of 17,707,715 persons (WABC Ex. 101, p. 11, R. 96; Tr. 53). It presently provides a skywave service at night to an additional area of 489,210 square miles and a rural population of 24,957,798 persons (WABC Ex. 101, p. 11; R. 96).<sup>4</sup> Thus, WABC's total primary and secondary coverage at night presently encompasses an area of 508,480 square

<sup>1</sup> See Statement of Points, Nos. 1-6, 9 and 10, supra.

<sup>2</sup> Neither Hubbard nor the Commission called any engineering witnesses of their own, nor did they attempt to refute by cross-examination any previously exchanged engineering exhibits of ABC which the Examiner subsequently admitted into evidence.

<sup>3</sup> As this Court will recall, the KOB problem is solely a nighttime one (35 FCC 37, para. 1). Both WABC and KOB could operate daytime on 770 kc with 50 kw (or for that matter with 750 kw) without causing any daytime interference to the other.

<sup>4</sup> It was the Examiner's failure to recognize that the overall population of this area exceeds 48,000,000 persons (R. 803), and that the 24,957,798 figure is restricted to rural populations, where a 0.5 mv/m 50% signal is deemed to constitute "secondary service" under the Commission's Rules, that led to his unfortunate misinterpretation of the engineering evidence (see R. 760-774; see also 35 FCC 43).



miles and a population of 42,665,513 persons (WABC Ex. 101, p. 11; R. 96) — within that portion of the United States east of a curve drawn from the Canadian border, southward along the western shore of Lake Michigan, down through Vincennes, Ind., and then southeasterly through Chattanooga, Tenn. to Savannah, Ga. (WABC Ex. 101, p. 13; R. 98).

The undisputed engineering evidence likewise shows that the 0.5 mv/m 50% skywave contours of NBC's and CBS's New York operations (Station WNBC on 660 kc and Station WCBS on 880 kc) encompass substantially the same area — with the skywave contours of WABC and WCBS being almost congruent (WABC Ex. 101, pp. 16, 18; R. 101, 103). Thus, the New York flagship stations for each of the three principal radio networks (ABC, CBS, and NBC), as the Commission itself recognizes, presently provide a primary and/or secondary service to some 42,000,000 persons (35 FCC 37, para. 3).

Under the Report and Order of September 13, 1961 in the Clear Channel Proceeding, of which the Examiner agreed to take official notice (Tr. 45), the frequency 660 kc on which WNBC operates is retained in status quo, with no new station to be placed thereon in any of the 48 contiguous states (31 FCC 576, para. 29; R. 103).<sup>1</sup> Under that same Report and Order, although the frequency of 880 kc on which WCBS operates is to be duplicated by a Class II-A station in North Dakota, South Dakota or Nebraska, WCBS is not required to directionalize and the new Class II-A station will be required to protect the present 0.5 mv/m 50% skywave contour of WCBS (31 FCC 581, para. 47; R. 101). In short, under the Clear Channel Decision, WNBC and WCBS will be protected to

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<sup>1</sup> Although speaking in terms of "deferring action" on 660 kc, it is to be noted that the Commission elsewhere terminated the Clear Channel Proceeding (31 FCC 601, para. 105). While the Commission listed 770 kc along with 660 kc as a channel on which action was being deferred (31 FCC 576, para. 29), its reasons for deferring action on 770 kc were quite different, namely, the Commission's prior conclusion that what should be done with 770 kc would be reached in Docket 6584 and not in Docket 6741 and the pendency of the instant proceeding (31 FCC 595, paras. 85, 90; cf. 31 FCC 606, fn. 3 to Rule 3.25 (a)).

the limit of their "generally usable service" (i.e., to their 0.5 mv/m 50% skywave contours),<sup>1</sup> and will thus continue, as they do at present, to provide a primary and secondary service at night to some 42,000,000 persons (R. 101, 103).

Under the 1961 decision in the Clear Channel Proceeding (31 FCC 597, para. 90) and the decisions rendered in the further hearings in Docket 6584 (25 FCC 683; 35 FCC 36), quite different treatment was accorded 770 kc. By those decisions WABC is told that it must directionalize in order to protect a new Class I station which is to be placed on 770 kc in Albuquerque, N. Mex. (KOB), even though this may necessitate the acquisition of a new site, the installation of an additional tower, the purchase of new phasing equipment, and the construction of a new transmitter building — at a cost running well into six figures (see Case No. 12,883, Tr. 1276, 1301).

By those decisions WABC is also told that it must hereafter use a pattern at night which will provide an interference-free primary service to an area of 15,410 square miles and a population of 17,005,389 persons, representing a net loss in its primary service area of 3,680 square miles (19%) and a net loss in primary population of 702,326 persons (4%) over that served by its present non-directional operation (WABC Ex. 101, pp. 11, 26; R. 96, 111).<sup>2</sup> By those decisions WABC is further told that it must hereafter use a pattern at night which will provide a secondary service to an area of 197,770 square miles (rather than 489,210 square

<sup>1</sup> Cf. Statement of FCC of February 13, 1962 opposing legislation designed to modify the Clear Channel Decision ("Clear Channel Broadcast Stations," Hearings, Subcommittee of House Committee on Interstate and Foreign Commerce on H.R. 8210 et seq., 87th Cong., 2d Sess., hereinafter cited as Hearings), where Chairman Minow stated (p. 236): "The new stations are required to protect the 0.5 mv/m 50 percent skywave contour of the I-A stations . . . which means that there will be no interference . . . within that contour, which is the limit of the I-A's station's generally usable service."

<sup>2</sup> WABC would lose a primary area to the west (of 4,807 square miles and a population presently served of 976,699 persons) and gain an area to the north (of 947 square miles with a population of 274,473), resulting in a net loss in primary service to an area of 3,860 square miles and a population of 702,326 (WABC Ex. 101, pp. 25-26, R. 110, 111).

miles), and a population of 7,743,950 persons (rather than 24,957,798 persons), representing a loss in area of 60% and in population of 69% vis-a-vis WABC's present secondary coverage (WABC Ex. 101, p. 11; R. 96).

In short, instead of providing a primary and secondary service to 42,665,513 persons as WABC does at present, WABC would hereafter serve 24,749,339 persons (WABC Ex. 101, p. 11; R. 96) — a net loss of almost 18,000,000 persons over the number presently served by WABC, and over the number which the flagship stations for ABC's two principal radio network competitors (CBS and NBC) will continue to serve under the Clear Channel Decision (R. 101, 103).

Thus, as a result of the Commission's actions in the Clear Channel Proceeding (Docket 6584), the frequency 770 kc is the only one of the 25 Class I-A which has been ordered broken down to permit two Class I operations thereon. WABC alone of the 25 dominant Class I-A stations is not being protected to the extent of its present usable service (i.e., to its 0.5 mv/m 50% skywave contour). WABC is the only one of the 25 Class I-A stations which is ordered to share its frequency by not being fully protected to the limits of its presently usable service and by being required to directionalize, and in doing so to curtail its present coverage by almost 18 million persons. While eleven channels, including CBS's frequency of 880 kc, were ordered broken down to permit a Class II-A operation thereon, the new station thereon will be required to protect the dominant station to its present 0.5 mv/m 50% skywave contour, and the dominant station will not be required to directionalize or to curtail its present coverage. Twelve channels, including NBC's frequency of 660 kc, fared even better — with those channels left in status quo (i.e., with no duplication anywhere within the 48 contiguous states)<sup>1</sup> and with

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<sup>1</sup> To forestall any "red herring" contention that 660 kc is already broken down by virtue of the fact that a 10 kw station has operated on that frequency in Fairbanks (Alaska) since 1939, attention is called to the fact that an identical argument by WJR that its channel was already broken down because duplicated in

(Footnote continued on following page)

those 12 channels reserved either for subsequent Class II-A breakdowns or for later "superpower" use (750 kw).<sup>2</sup>

As the undisputed engineering evidence of record further shows, those portions of WABC's present primary and secondary area which it would thus cease to serve already receive fewer services from ABC owned or affiliated stations than they receive from CBS and NBC owned or affiliated stations (WABC Ex. 101, pp. 20, 21, 23, 25, 27, 28, 30; R. 105, 106, 108, 110, 112, 113, 115), with the ABC radio network thus less able to bear coverage losses of that magnitude.<sup>3</sup> In fact, some

<sup>1</sup> (Footnote continued from preceding page)

Hawaii was flatly rejected by the Commission (31 FCC 590, para. 72), and to the fact that at the time of the Second Notice in Docket 6584 (April 1958) and notwithstanding the 10 kw operation in Alaska, the Commission proposed to place a Class I station on 660 kc in Montana. The placement over the years on U.S. Class I-A channels of 10 kw operations in Alaska, Hawaii and the territorial possessions has never been construed as a "breakdown" of the U.S. I-A clears. Amended Rule 3.25(a)(4) expressly provides for unlimited-time Class II assignments in Alaska, Hawaii, etc., on all 25 Class I-A's provided that they do "not deliver more than 5 uv/m groundwave day or night or 25 uv/m 10% skywave at night at any point" within the 48 contiguous states.

<sup>2</sup> This potentiality for superpower possessed by the 12 channels which were not broken down and to a lesser degree by the 11 channels on which a single Class II-A operation was authorized is a consideration of no small moment in determining whether the networks have been accorded equal facilities, with superpower out of the question on 770 kc if the instant decision stands (see Hearings, p. 238).

<sup>3</sup> The Commission's conclusions, particularly with respect to the areas which WABC would cease to serve, predicated on the overall number of stations affiliated with ABC, are disingenuous (35 FCC 37, 39, paras. 4 and 11). The problem here, as the Commission elsewhere recognized, is a nighttime one (35 FCC 37, para. 1). Thus, the large number of daytime-only stations affiliated with ABC has no bearing on this nighttime problem. Furthermore, the Commission itself is on record that little improvement in rural service "may be expected from Class III or IV stations because of unavoidable limitations on their nighttime interference-free service ranges" (31 FCC 565, 569, para. 7). The population which WABC would lose is almost exclusively rural. With almost 17,000,000 of the 18 million people whom WABC would lose dependent on skywave service for the programs of the ABC radio network, with 5,667,000 thereof dependent on skywave signals for a radio service of any kind, it is skywave service by which these people must be reached by ABC. As the Examiner himself recognized (35 FCC 70, para. 69), NBC and CBS "have overwhelmingly superiority" on that score, particularly in the 13 states all or portions of which WABC would lose. To appreciate ABC's present inferior position (cf. 35 FCC 39, para. 8), the Court need only look at WABC Ex. 101, pp. 35-46 (R. 120-131), which shows 49 stations affiliated with ABC serving portions of WABC's present service area at night (R. 120-121) as against 64 affiliated with CBS (R. 122-124) and 62 with NBC (R. 129-131). Even more significant, as shown by those lists, ABC has only 10 affiliates (including WABC and WLS) on the wide-coverage frequencies below 1000 kc, whereas CBS

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850,000 persons who presently receive a primary service from WABC (in some instances within 40 miles of New York City) would hereafter be dependent on an intermittent skywave signal by a single station (that of WLS in Chicago) for the program service provided by the ABC radio network (WABC Ex. 101, pp. 15, 25; R. 100, 110, 804-805).<sup>4</sup> Similarly, of the 17,200,000 persons to whom WABC would cease to provide a skywave service, almost 16 million thereof (of whom 5,667,808 are dependent on a skywave signal for a radio service of any kind)<sup>5</sup> would hereafter be dependent on intermittent skywave service from 0-2 (rather than 1-3) stations for the programs of the ABC radio network, whereas that same

<sup>3</sup> (Footnote continued from preceding page)  
has 23 and NBC has 20 (R. 120, 122, 129).

It is little wonder, therefore, that the Examiner, at a time when he failed to understand the evidence of record and that such was indeed the precise loss which ABC faced (R. 757-774), stated: "... if a network demonstrates that it, as a network, has, in fact, been deprived of service area and audience equal to approximately 10% of that available in the entire country [i.e., approximately 17,000,000 persons] it may well have made a prima facie showing of prejudice and adverse effect vis-a-vis its competitors who are not similarly deprived" (35 FCC 57, para. 38). Merely because ABC did not endeavor to hang a dollar sign on the extent of that prospective loss does not make it any the less real or pertinent. National Broadcasting Company v. Federal Communications Commission, 76 U.S. App. D.C. 238, 240-242 (1942), aff'd 319 U.S. 239 (1943). (See Exception No. 22, R. 703-704).

<sup>4</sup> Stated in more dramatic but equally accurate fashion, if WABC were to directionalize, more people (850,000) would lose the only nighttime primary signal by which they presently receive the programs of the ABC radio network than will gain a first nighttime primary service from the eleven Class II-A stations authorized in Docket 6741 (600,000 persons). See The Goodwill Stations, Inc. v. Federal Communications Commission, Case No. 17,498, Slip Op. p. 13 (decided October 31, 1963).

<sup>5</sup> Stated somewhat differently, the "white area" population to which WABC would cease to provide a skywave service if it were to directionalize (i.e., 5,667,808 persons) is twice the "white area" population of the eight Rocky Mountain states combined -- a fact immediately apparent from the United States 1960 Census figures, if one subtracts the population of the metropolitan areas and cities with nighttime radio stations (4,182,828) from the total population of those states (6,855,060). In fact, as shown in Docket 6741, more than 18 million of the 25 million people in the United States who are presently without primary service at night reside east of the Mississippi. Nevertheless, in each of the 11 instances where a channel was broken down in Docket 6741, such action was taken to provide primary service at night in states west of the Mississippi. From those breakdowns of 11 channels, as admitted in hearings before the House Committee (Hearings, p. 235), the Commission expects that only about 600,000 persons will receive a first primary service at night -- less than one-ninth of the white area population which would be lost to WABC through the placement of a Class I station on 770 kc in Albuquerque. See Goodwill Stations, Inc. v. Federal Communications Commission, Case No. 17498, Slip Op. p. 13 (decided October 31, 1963).



area will continue as heretofore to have from 5-9 and 3-10 skywave services by which to receive the programs of the CBS and NBC radio networks (WABC Ex. 101, pp. 15, 16, 18; R. 100, 101, 103, 804-805).

As testified to by ABC's engineering consultant (Dr. Frank G. Kear), whose qualifications were conceded by Hubbard and by the Bureau (Tr. 113-114), one or two skywave signals are not a reliable or dependable source for a given program service in areas (as here) not receiving an interference-free primary signal from other stations carrying those same programs (Tr. 117-119; cf. 35 FCC 61, para. 48).

The need for multiple skywave outlets, if the programs of the ABC network are to be available (as here) to 16,000,000 persons lacking a primary service, is emphasized by considerations in addition to the intermittent or fluctuating characteristics of skywave signals. As shown by the present record, because of local commitments, because of talent conflicts, and because a given station may not be ordered by the sponsor, a number of programs on the ABC radio network may not be carried by a particular affiliated or even by an O&O operation (Tr. 292-295). Since much of the differential area (about 16 million persons) would be entirely dependent on one or a maximum of two skywave signals for the programs of the ABC radio network in the event WABC were to directionalize, this means that the program service of that network would be substantially blacked out if WLS or KXEL were not ordered by the sponsor, or if they substituted a local show, or if for any other reason (talent or advertiser conflicts) they failed to carry a given network feed.<sup>1</sup>

B. Non-engineering Facts of Record. — As stated by James E. Duffy, who was formerly an account executive (1953-1957) and later Director of Sales for the ABC Radio Network Central Division in Chicago

<sup>1</sup> Approximately 90% of the programs of the ABC radio network either originate or are fed out of New York (Tr. 238), and approximately 80% of all programs produced by the ABC radio network, including all news programs (Tr. 141), but exclusive of sustaining musical programs, are carried by WABC (Tr. 236-238). Thus, WABC is a key station in the ABC radio network set-up, particularly in the east where the instant losses would occur.



(1957-1960) and who has been National Director of Sales for the entire radio network since May of 1960 (Tr. 289-291), ABC has operated its radio network over the years at a disadvantage vis-a-vis its older competitors (NBC and CBS): (1) by reason of fewer owned or affiliated clear-channel facilities (Tr. 298); (2) by reason of fewer full-time (as distinguished from daytime) affiliated stations (Tr. 293, 298, 300, 301); (3) by reason of the generally inferior operating power of its full-time affiliates vis-a-vis the affiliates of the other two major networks (Tr. 301); and (4) by reason of the absence of full-time affiliates in key markets like Miami, Boston, Louisville, Birmingham, Oklahoma City, Houston, Kansas City and St. Louis — to name a few (Tr. 306, 334) (cf. 35 FCC 55, para. 33).

As Mr. Duffy further pointed out, ABC's lack of "umbrella coverage" at night, to make up for the loss of affiliates who are daytime-only licensees (Tr. 293, 294),<sup>1</sup> is a problem even now in obtaining and keeping sponsorship of network programs on ABC at night (Tr. 293, 294). The matter of ABC's inferior radio coverage at night is brought up time and again by prospective national sponsors desirous of "maximum coverage" of their local dealerships (Tr. 293, 295, 301, 302, 303, 304). The problem of "clearance and coverage" arises constantly (Tr. 280-281).<sup>2</sup>

Even with WABC operating as at present, sales have been lost because the advertisers were dissatisfied with ABC's nighttime coverage (Tr. 304). The "hard enough problem" which ABC presently has in obtaining sponsorships of nighttime programs would be aggravated if ABC's flagship station ceased to serve some 17,200,000 people to whom

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<sup>1</sup> As brought out by KOB's attorney on cross, it is not the practice of ABC's daytime-only affiliates to transcribe nighttime network programs for delayed broadcast ("a.b.") the following day. In fact, because of timeliness factors, d.b. broadcasts of news presentations by more than three hours is not permitted by ABC (Tr. 314-315).

<sup>2</sup> To illustrate, where by reason of a talent conflict WLS was unable to carry the Alex Dreier Good News Program, a 52-week sponsorship was obtained only after a showing was made that WABC's present extensive secondary coverage would partially compensate for WLS's failure to carry that program and for the loss at night of ABC's vast number of daytime-only affiliates in the east (Tr. 292-295, 336).

it presently provides a secondary service and the 976,000 persons to whom it presently provides a primary service (Tr. 304).

While ABC claims that it presently reaches 95% of the radio homes in the United States at night (Tr. 273, 305, 309), this figure is less than that of CBS (96.8%) and NBC (97.6%) — figures which (like ABC's) obviously include "skywave" coverage inasmuch as some 25,000,000 persons in the United States (some 14%) presently have no primary radio service at night (Tr. 309, 324). Even at present, because of its lesser coverage, a rate differential is required to sell "news" on ABC vis-a-vis the other networks — \$1000 for 5 minutes on ABC versus \$1200 on CBS and NBC (Tr. 317). If WABC, as the flagship station for the ABC radio network, served fewer people (by almost 18 million) than the comparable NBC and CBS stations, such fact would certainly be used on every occasion by those networks to wean sponsorships away from ABC (Tr. 304).

As elsewhere shown by the present record, the loss by the ABC radio network of the "umbrella coverage" presently provided by WABC would have decided public interest ramifications in those portions of WABC's present primary and secondary service area which would hereafter be dependent on 0-2 skywave services for the programs of the ABC network (in excess of 16 million persons). Although much of the program evidence which ABC sought to introduce in this proceeding to point up the public interest consequences to the ABC network and to the population thus lost, was excluded as "beyond the issues" (WABC Ex. 104, R. 151-334, Tr. 219), enough was received to show that ABC is presently providing a meritorious and needed radio network service, which some 16 million people should not be foreclosed from receiving and which the ABC radio network should not be foreclosed from serving.

For example, it was shown that, with the advent of television, network radio has become a service medium rather than a theatrical medium (Tr. 229). To that end, according to the testimony of the programming director for the ABC radio network (Tr. 228), it is the responsibility

of network radio today to provide a broad service (all possible types of information) to the American people; it is this type of service which makes the network attractive to its affiliates, its listeners, and its sponsors (Tr. 229). Accordingly, ABC is in the business of creating the best possible news service, the greatest selection of commentators, information on every possible subject from fashion to diet — thus providing to local stations a service which they cannot provide for themselves (Tr. 229-230). To make its news service distinctive, it is important for ABC to "let listeners hear things as they happen" (Tr. 230).

To satisfy the public demand not only for on-the-spot and instantaneous coverage but for news in depth, ABC has greatly expanded its news and public affairs departments in recent years (see WABC Ex. 104, pp. 2-4, R. 152-154).<sup>1</sup> As a result, ABC presently has domestic news bureaus in Washington, Chicago, Detroit, Los Angeles, Pittsburgh and San Francisco, with 20 commentators and newscasters in New York, 2 in Chicago, 7 in Los Angeles, 12 in Washington and one each in San Francisco, Boston, and Detroit (see WABC Ex. 104, pp. 2-3, R. 152-153). On this roster are such well-known news analysts as Quincy Howe, Bill Shadel, John Cameron Swayze, Alex Dreier, Paul Harvey, Peter Clapper, Robert Fleming, Edward P. Morgan — to name a few (see WABC Ex. 104, p. 3, R. 153). ABC has foreign news bureaus in Berlin, Buenos Aires, London, Moscow, Nairobi, Paris, Rome and Tokyo, flanked by foreign correspondents in Algiers, Bangkok, Beirut, Cairo, Copenhagen, Geneva, Hong Kong, Manila, Mexico City, New Delhi, Rio de Janeiro, Saigon, Tel Aviv, Tunis and Vienna (see WABC Ex. 104, p. 4, R. 104).

With a farflung news setup of this type, ABC averages around 200 "actualities," i.e., on-the-scene reports, each week (Tr. 230). At five

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<sup>1</sup> Although all of WABC Ex. 104 (R. 151-334) when offered through Mr. Neal was excluded (Tr. 219), ABC was afforded the opportunity through another witness (Mr. Rafael) to submit certain related material. Mr. Rafael testified to the correctness of the data contained in pp. 2-4 of Exhibit 104 (R. 152-154), describing ABC's news-gathering facilities (Tr. 231). The Examiner denied a subsequent motion by KOB to strike Mr. Rafael's testimony concerning ABC's news facilities (Tr. 261-262).

minutes before the hour (from 7:55 a.m. to 11:55 p.m.) the ABC radio network provides to its affiliates five minutes of news on a regular basis, plus a regularly scheduled block of news and commentary in the early evening (Tr. 231). In addition to regularly scheduled newscasts, ABC provides coverage in depth of special events, such as President Kennedy's trip to Europe (Tr. 232) and to South America (Tr. 143). In fact, on scheduled special events (such as the space shots), it is ABC's practice to broadcast background information the evening before (Tr. 232).

ABC's budget for providing programs to its AM affiliates presently runs between 3 and 1/2 to 4 million dollars a year (Tr. 243). A number of programs produced by the ABC radio network (broadcasts of particular special events, year-end news reviews, public affairs subjects, Boys Town Choir, Negro choirs, etc.) are not carried on competing networks (Tr. 268-269). With the Commission on record that multiple competitive networks are in the public interest (see 35 FCC 39, paras. 8 and 9), and with the Supreme Court on record that diverse news sources are essential to a free society (Associated Press v. United States, 326 U.S. 1, 20 (1945)), any action by the Commission which curtails and endangers the ability of approximately 17 million persons to receive the news and other meritorious program service by one of the principal nationwide networks should not be lightly condoned (cf. 35 FCC 41, para. 15).

C. Summary. — To require ABC, whose radio network facilities at night are already inferior to those of the other two major networks, particularly in the areas where the losses here suffered would occur, to so directionalize its flagship station (WABC) as to reduce its net primary coverage by 702,000 persons and its secondary coverage by 17,200,000 persons, in an area east of the Mississippi where a substantial portion of the population thus lost will have no access or only limited access at night to the admittedly meritorious program service provided by the ABC radio network (cf. 35 FCC 38, fn. 5), while protecting almost identical coverage presently provided to 42 million persons by the flagship stations

of its two major competitors (NBC and CBS), which already have far more numerous and dependable means of making their network services available to the area which WABC would lose, does not (in the language of Issue 2 in the 1961 hearing order) provide "facilities to the ABC Network in New York on a basis which is fair and equitable in comparison with other networks."

It does not (in the language of this Court's 1960 decision) "provide channel facilities to the ABC network on a basis which is fair and equitable in comparison with other networks." And, contrary to this Court's admonitions in 1960, ABC is being permanently prejudiced as a network by being forced to directionalize and to share a channel, whereas the other major networks are being given full use of their clear channels by protecting their existing operations to the extent of their present usable service (0.5 mv/m 50% skywave contours), with the flagship channels of those networks retaining a valuable potentiality for superpower (750 kw). See Goodwill Stations, Inc. v. Federal Communications Commission, Case No. 17,498, Slip Op. pp. 6, 13 (decided October 31, 1963).

## II. The Commission, in Failing to Rectify in the Instant Proceeding the Inequity It Created in 1958 and 1961, Ignored the Evidence of Record, the Mandate of This Court, and the Public Interest<sup>1</sup>

Having thus shown that the Commission by its previously taken actions has not provided channel facilities to the ABC network in New York on a basis which is fair and equitable in comparison with those provided the three other radio networks, the next question to be determined (using the phraseology of Issue 2) is whether this fact should vary certain conclusions heretofore reached regarding the dual utilization of 770 kc, or (using the phraseology of paragraph 11 of the 1961 hearing order) whether this fact should "override" the 307(b) determination previously reached in 1958.

<sup>1</sup> See Statement of Points, Nos. 1-4, 9-10, supra.



Although Issue 2, as worded by the Commission, apparently contemplates that if certain evidence was adduced the 1958 conclusions should be modified,<sup>1</sup> nowhere in its Memorandum Opinion and Order directing a "further hearing" (R. 7-14) did the Commission spell out just what factors or criteria should be used or how they were to be evaluated or weighed in determining whether to vary or override the September 1958 result. Be that as it may, several matters (now to be discussed) are highly significant and cannot logically be ignored or overlooked.

A. Intervening Changes in Allocation Philosophy. — The Commission's decision, at the conclusion of the earlier hearing in Docket 6584, to permit two Class I operations on 770 kc and to require WABC to directionalize, was adopted September 3, 1958 (25 FCC 683). At that time there was pending before the Commission a proposal embodied in the second further notice in Docket 6741, released some four months earlier (April 15, 1958), where the Commission proposed to duplicate 12 of 24 U.S. Class I-A channels and to reserve the other 12 for possible higher power. On five of the 12 channels which were there to be duplicated, the Commission proposed to place Class I (skywave) stations thereon and to require the heretofore dominant station to directionalize. On the remaining seven it proposed Class II (non-skywave) operations which would protect the dominant station.

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<sup>1</sup> That the Commission intended to hold to a minimum the evidence to be received in the "further hearing" in Docket 6584 is clear from the July 27, 1961 Order where the Commission categorically asserted that no evidence would be received under Issues 1 and 3, only Issue 2 (R. 12-13, para. 11). At no point in the instant proceeding did the Commission appreciate that, having permitted an "inequality" to arise between the networks by its actions in 1958 and 1961, it was under a mandate of this Court to rectify that result in the proceeding which the Commission had ordered *sua sponte* for that purpose in July 1961. The errors here complained of (the failure to consider other frequencies, the failure to receive program data, the rejection of proffered data contrasting the substantial losses in the east with the minimal gains in the west), stem in the main from the Commission's unwillingness, at least after it ordered the instant hearing (R. 7-14), to recognize the fact that this Court, come what may, had not unqualifiedly affirmed the 1958 result, and from its failure to heed this Court's warnings that ABC was not to be required to share a channel if the other networks were given full use of their channels, and that "the Commission should seek to provide channel facilities to the ABC network which is fair and equitable in comparison with other networks."



More specifically, in that Second Notice, only recently released when the KOB decision was adopted in 1958, the Commission proposed to require NBC to directionalize its New York operation on 660 kc so as to permit a new Class I station thereon in Montana. It proposed to require ABC to directionalize its New York operation on 770 kc so as to permit "a new Class I station on 770 kc in a western state" (para. 73). It proposed to require CBS to directionalize its New York operation on 880 kc so as to permit a Class I station in Wyoming.<sup>1</sup>

Thus, at the time that the Commission on September 3, 1958 adopted its decision in Docket 6584 to require WABC to directionalize its New York operation on 770 kc so as to permit a Class I operation on that frequency in New Mexico, it had comparable proposals pending before it in Docket 6741 looking toward identical action on NBC's channel in New York (660 kc) and on CBS's channel in New York (880 kc). In other words, at the time it originally concluded in Docket 6584 that WABC should directionalize and that a new Class I station would be placed on 770 kc in New Mexico, it appeared to be only a matter of time until the other two networks would be required in Docket 6741 to directionalize their New York operations so as to permit new Class I stations thereon in designated states in the Rocky Mountain area. Since CBS and NBC would thus suffer almost identical losses, it is not surprising that the substantial losses which WABC would suffer in the east from KOB's Class I operation in the west, with the record there restricted over ABC's objection to naked population figures, was not thought by the Commission to be decisive at the time of its 1958 decision in Docket 6584.

However, by July of 1963 that situation had completely changed. As a result of comments in response to its Second Notice in Docket 6741,

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<sup>1</sup> It likewise proposed to require WHAM to directionalize its operation on 1180 kc to permit a new Class I assignment in Idaho, and KYW to directionalize on 1100 kc to permit a new Class I assignment in Arizona. See Appendix A to ABC's Brief in Case Nos. 15,399 and 15,400.

the Commission had concluded in its Third Notice of September 22, 1959,<sup>1</sup> that to require the dominant stations in the east to directionalize so as to permit Class I (skywave) operations in the Rocky Mountain states would result in "substantial dislocations" of present skywave service "which would not be fully compensated by new operations" (para. 7). That view was adhered to and finalized in its Clear Channel Decision of September 13, 1961 (31 FCC 565, para. 23). Thus, by July 1963, the Commission knew what it did not know in 1958, that NBC and CBS (and for that matter none of the other Class I-A's) were going to be required to directionalize, that the skywave dislocation problem in the east was a serious one, and that the dual Class I approach was not going to be utilized on any of the other clears to provide service in the Rocky Mountain area.

Similarly, on a closely related matter, when the Commission adopted its September 3, 1958 decision in Docket 6584, it had likewise indicated in its Second Notice of April 15, 1958 in Docket 6741 that one of the principal ends to be accomplished in the decision yet to be reached in the Clear Channel Proceeding would be to provide more sky-wave service in the Rocky Mountain area — to be effectuated by authorizing new Class I facilities in the west on a number of eastern clears, with the dominant stations revising their operational patterns accordingly. The September 3, 1958 decision in Docket 6584 was adopted some four months after tentative conclusions to accomplish that aim by new Class I (skywave) assignments in the west on five eastern Class I-A channels (including those of NBC and CBS) were announced in the Second Notice in Docket 6741.

Here again, after the 1958 decision in Docket 6584 had been released, that particular approach to skywave signal shortages in the west was subsequently discarded in the Third Notice of September 1959 in Docket 6741, and was not revived in the final decision in 1961. Realizing

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<sup>1</sup> See Appendix B to ABC's Brief in Case Nos. 15,399 and 15,400.

(as did the Second Notice) that much of the "white area" in the west, and elsewhere, will probably never be able to receive primary service, for both technical and economic reasons, and will thus be dependent on skywave signals, the approach finally used in Docket 6741 (31 FCC 565) was to permit Class II-A (non-skywave) duplication at this juncture on 11 channels so as to provide more primary service, and to defer action on the remaining U.S. Class I-A clears (other than 770 kc), reserving them for possible superpower or Class II-A duplication at a later date and in a later proceeding (cf. 31 FCC 601, para. 105) — knowing that with superpower the unduplicated clear channels could supply four reliable skywave signals to substantially the entire United States. The Goodwill Stations, Inc. v. Federal Communications Commission, Case No. 17,498, Slip Op. p. 6 (released October 31, 1963). Thus, the Class I duplication approach, to be effectuated by the dominant station directionalizing so as to provide more skywave service in the Rocky Mountain area, was in no instance used in the final decision in Docket 6741 nor was it proposed for the future.

That those two approaches to the Clear Channel problem, both of which were subsequently discarded in the final decision in Docket 6741 (31 FCC 565), had weighed heavily in the Commission's attempt to justify the result it reached in 1958 is apparent (see 25 FCC 683, 781, Concl. 25).

B. New Data Available to the Commission for the First Time. — Nor were these basic changes in allocation philosophy the only differences between the situation in 1958 and in 1963. The conclusion reached in 1958, that the somewhat minimal gains in the west outweighed the substantial losses suffered by ABC in the east, was based on a record where ABC had been precluded from showing that it would be left with only a limited number of signals by which the programs of the ABC network could be supplied to the primary and secondary service area it would thereby lose, whereas both NBC and CBS have far more sources by which to reach these areas.

Thus, in weighing the consequences in 1958 of a new Class I operation on 770 kc, the Commission did not there have data before it, as it did in 1963, that the vast majority of the 976,000 persons (approximately 850,000) to whom WABC would no longer provide a primary service would hereafter be dependent on a single skywave signal (that of WLS) for the programs of the ABC network (R. 804-805). It did not in 1958 have before it data showing that the vast majority (almost 16 million) of the 17,200,000 to whom WABC would no longer provide a skywave service would hereafter be restricted to 0-2 intermittent and fluctuating signals for the program service of the ABC radio network (R. 803-804), meaning that almost 16 million persons would have no source for the program service of that network in the event the particular program was not carried on WLS or KXEL (because of local commitments, talent conflicts, or a failure of a sponsor to order those particular stations). It did not then have data that CBS and NBC with more Class I affiliates could better withstand such losses. It did not then have data before it, as it did in 1963, of the impact which this loss would have on ABC's ability to provide effective network competition vis-a-vis its more dominant competitors. It did not then have data before it, as it did in 1963, showing that it is difficult enough even at present to obtain and hold sponsors for nighttime network programs on ABC vis-a-vis NBC and CBS, and that the substantial curtailment of WABC's coverage cannot but result in the other networks weaning sponsorships away from the ABC radio network.

Finally, the Commission in 1958 did not have before it, as it did in 1963, this Court's pronouncements in 1960 (108 U.S. App. D.C. 83, 87) that "the Commission should seek to provide channel facilities to the ABC network on a basis which is fair and equitable in comparison with other networks," and that ABC should not be forced "to share a channel if other networks are given full use of clear channels."

Thus, if the 307(b) conclusion in 1958 was a close and difficult one, as the Commission then indicated that it was (25 FCC 683, 781, Concl. 25),

the foregoing considerations which have since intervened, when coupled with the additional evidence which ABC here adduced and this Court's intervening mandate, should have made the conclusion an easy one in 1963 — that the 1958 result should indeed be "varied," and that ABC, in line with the 1960 mandate of this Court, should be accorded flagship channel facilities comparable to the other principal networks.<sup>1</sup>

### III. The Public Interest and This Court's 1960 Mandate Require That 770 kc be Broken Down in the Same Fashion as 880 kc and the Other Channels on Which Class II-A Stations Have Been Authorized

With the Commission having failed in the Clear Channel Decision of September 13, 1961, to heed this Court's 1960 warnings, ABC offered the Commission a perfect "out" in the instant proceeding — with all persons who would be directly affected by ABC's proposed solution already participants in the further hearing in Docket 6584.

During the pendency of the Clear Channel proceeding (1945-1961), not knowing until the September 1961 decision was released, whether any of the other 24 Class I-A Clear Channels were to be duplicated or in what fashion, ABC vigorously opposed the placement of a second unlimited time operation on 770 kc (either Class I or Class II). However, with the Commission having concluded in Docket 6741 that a Class II-A operation should be permitted on each of 11 U.S. Class I-A clears in a designated state or states in the west, with the new Class II-A stations protecting the present 0.5 mv/m 50% skywave contour of the dominant

<sup>1</sup> So that the Commission would not have to consider in a vacuum the substantial losses which ABC and the public would suffer east of the Mississippi if WABC directionalized, and so that such losses could be weighed against the minimal gains to KOB and the public west of the Mississippi, ABC proffered updated data on this score (WABC Ex. 101, pp. 31-34, 53; R. 116-119, 138; WABC Ex. 102, R. 139-149). Such evidence was rejected by the Examiner as not within the scope of Issue 2 (Tr. 79-82). Notwithstanding ABC's exceptions thereto (Exception 31, R. 730), the Commission ruled that such evidence was properly rejected because directed "to the already settled 307(b) question" (35 FCC 43, ruling on Exception 31). In short, ABC was accorded a "hearing" in name only, and not the type of "hearing" specified in 108 U.S. App. D.C. 83, 87-88 (1960). See Statement of Points, Nos. 7-10, supra.



station, ABC expressly stated on the record and in various pleadings in the instant proceeding (Tr. 353-354):

In the event the decision thus reached in the Clear Channel Proceeding is not hereafter substantially changed, as a result of petitions for reconsideration now pending and as a result of any subsequent court review thereof, . . . ABC is prepared to acquiesce in the placement of a second station on 770 kc in the Rocky Mountain area, provided WABC (like the Class I-A stations on the eleven clear channels which were broken down in Docket No. 6741) is not required to directionalize, and provided the second station placed on 770 kc (like the eleven Class II-A stations contemplated in Docket No. 6741) is required to protect WABC's 0.1 mv/m contour daytime and its 0.5 mv/m 50 per cent skywave contour nighttime . . .<sup>1</sup>

If the Commission were to take the same action on 770 kc as it did with respect to the clear channels which were broken down in Docket 6741 (amended Rule 3.22(a)), i.e., authorize a Class II-A operation thereon in a designated western state, with such station required to protect WABC's existing 0.5 mv/m 50% skywave contour, ABC would thereby be on a par with CBS, though it would still be receiving less favorable treatment than NBC did on its untouched frequency of 660 kc (on which action was deferred) — a difference which could become substantial if superpower is ever authorized on the clears which were not broken down in the west.<sup>2</sup> However, ABC stated to the Commission and repeats that statement here that it is prepared to waive such potential disparity in the interest of terminating this prolonged controversy.

Thus, ABC has afforded the Commission a perfect "out" in this proceeding. If the Commission had heeded that suggestion, WABC (like

<sup>1</sup> ABC's only other Class I-A facility (Station WLS in Chicago) was similarly broken down in Docket 6741 for Class II-A use. ABC not only acquiesced in that action but supported those aspects of the Clear Channel Decision from which WGN, WJR, and Westinghouse appealed (Case Nos. 17,498 et seq.)

<sup>2</sup> Cf. FCC Statement (Hearings, supra, p. 238), where the Commission admitted that superpower was probably out of the question on 770 kc (if two Class I stations occupied that channel), though arguing that superpower would still be possible on the 11 channels on which Class II-A's were permitted, and of course on the 12 untouched channels.



WCBS and WNBC) would continue to serve some 42,000,000 people. Some 976,000 persons to whom WABC presently renders a primary service would not hereafter be largely dependent on the skywave signal of WLS for the nighttime programs of the ABC radio network. In excess of 90% of 17,200,000 persons in the differential area (of whom 5,667,000 are entirely dependent on skywave signals for a nighttime radio service) would at least be assured of 1-3 skywave signals (rather than 0-2) as potential sources for the meritorious program service provided by the ABC radio network — still far fewer skywave services than either CBS or NBC presently have in that area.

If the Commission had taken such action, it would have eliminated the anomalous situation of singling out 770 kc as the only one of the 25 U.S. Class I-A channels which is being "broken down" and required to directionalize in order to accommodate a Class I (skywave) operation in the west. ABC would not have been made the victim nor required to bear the burden of providing a solution to a problem arising out of matters for which ABC was in no way responsible.<sup>1</sup> The Commission would have been consistent — it would be emphasizing primary coverage on all channels broken down to date, leaving the shortage of skywave signals in the west to be met by the new Class II-A stations and by possible superpower on the 12 channels on which action was deferred. With the Commission on record that multiple competitive radio networks are in the public interest, ABC's presently inferior position from the standpoint of coverage through owned and affiliated outlets would not be aggravated. And the Commission would have given effect to this Court's warnings in 1960 that ABC is entitled to treatment comparable to that ultimately accorded to the other networks in the then-undecided Clear Channel Proceeding — that it should not be required to share its New York channel if the other networks are given full use thereof.

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<sup>1</sup> See Statement of Points, No. 10(b), supra.

Certainly Hubbard Broadcasting, Inc., which acquired KOB in 1957 with knowledge of the controversy over its operating assignment (and hence with no warranty by the seller or his predecessor regarding KOB's operating frequency),<sup>1</sup> has no private equities in 770 kc, and would have no just cause for complaint if KOB were to operate unlimited time on 770 kc with 50 kw, DA-N, as a Class II-A station. Operating in that fashion KOB would have substantially greater coverage at night than it now has (770 kc, 50 kw day, 25 kw night, DA-N), and in fact greater coverage than it has ever heretofore enjoyed, either before or since NARBA.<sup>2</sup>

Nor do the public equities point to a different result. While KOB operating as a Class I station on 770 kc (50 kw, U, DA-N), by virtue of a lower nighttime limitation accomplished through WABC directionalizing, would thereby provide a primary service at night to more people than it would as a Class II-A operation (50 kw, U, DA-N), the same is true of the eleven other channels on which the Commission in its 1961 decision decided to place Class II-A operations. In other words, if the dominant eastern stations on 670, 720, 780, 880, 890, 1020, 1030, 1100, 1120, 1180 and 1210 had been ordered to directionalize in Docket 6741, the new stations in the west on those channels would have provided primary service to more people at night than they do as Class II-A operations protecting the existing skywave contours of the dominant stations. Similarly, if the

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<sup>1</sup> When Time, Inc. and Wayne Coy acquired KOB from T. M. Pepperday in 1952, the purchase agreement (para. 9) expressly recited that the Buyer was aware of this Court's 1951 decision and of the litigation since 1941, and that the "uncertainties with respect to the licensed status of KOB shall not be grounds for rescission of the agreement or breach of warranty." The subsequent contract by which Hubbard acquired KOB in 1957 contained not dissimilar provisions. And in each instance the Commission's consent was granted subject to the mandate of this Court and the outcome of litigation then pending (see R.\* 2933C).

<sup>2</sup> As noted by ABC in its Statement of the Case, *supra*, KOB never operated with more than 10 kw on 1180 kc prior to its shift to 1030 kc. Nor has it ever operated to date with more than 25 kw power at night on either 1030 kc or 770 kc (see Exception 2). See Statement of Points, Nos. 8 and 10(c), supra.

eastern clears on those channels had been ordered to directionalize, the new stations in the west on those channels would thereby have provided additional skywave service to the Rocky Mountain states. But the Commission, because of "dislocations" not "compensated for" by new service, discarded such a dual Class I approach in its Third Notice in 1959 and its Clear Channel Decision in 1961 (31 FCC 565, 574, para. 23) vis-a-vis the 24 Class I-A channels there involved. The present record shows that that approach should have been discarded here with respect to 770 kc.

Since Nevada, Idaho, Wyoming, and other Rocky Mountain states would likewise gain more primary service if the new stations were allowed to operate as Class I's rather than Class II-A's, with the present dominant station directionalizing and thereby lowering the new stations' nighttime limitations, there appears no sound basis why the people of New Mexico should be favored over the people of the other Rocky Mountain states. Why should white areas in New Mexico receive a primary service from a Class I operation, at the expense of some 18,000,000 persons in the east who would be left with no means (other than 0-2 fluctuating and fading skywave signals) by which to receive the program service furnished by the ABC radio network, while the equally sizeable white area population in the other Rocky Mountain states must be content with less primary coverage from Class II-A operations authorized in Docket 6741? Nowhere has the Commission explained why additional primary coverage in New Mexico is so important in Docket 6584 as to require ABC to suffer such consequences, but not so important in the other Rocky Mountain states (with similar white areas) as not to require comparable action on the 11 channels broken down in Docket 6741.<sup>1</sup>

Furthermore, since the relatively small additional population to which KOB would bring a first primary service at night (67,000 persons),

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<sup>1</sup> See Statement of Points, No. 10(c), supra.

if it operated as a Class I rather than as a Class II-A facility on 770 kc, already receives 8-11 secondary signals from stations which, like KOB, are affiliated with NBC,<sup>1</sup> the need of 67,000 people for a primary service at night by another NBC affiliate scarcely justifies action which would leave some 850,000 persons (who now receive a primary service from WABC) entirely dependent on a skywave signal from WLS for the programs of the ABC radio network, nor action which would deprive 17,200,000 persons of WABC's present secondary service, bearing in mind that 5,667,000 people in the differential area have no primary service of any kind, that in excess of 90% thereof do not receive primary service from any station associated with ABC, and that almost 16,000,000 persons would thus be left hereafter with no reliable means of receiving the program service provided by the ABC radio network.

In short, in the actions here challenged, the Commission ignored the public interest, the evidence of record, and this Court's 1960 mandate when it denied ABC's request for an ultimate conclusion along the following lines:

"At the time that we [the Commission] decided in Docket 6584 (September 3, 1958) to permit two Class I operations on 770 kc, by requiring WABC to directionalize and to give up 60% of its secondary service area, we were then proposing, by virtue of our Second Notice of April 15, 1958 in Docket 6741, to require WNBC and WCBS to directionalize their operations in New York on 660 kc and 880 kc in like fashion so as to permit Class I operations thereon in Montana and Wyoming. We have since concluded (in our Third Notice of September 22, 1959 and our final decision of September 13, 1961 in Docket 6741) that the dislocations in existing skywave coverage would not be offset by new

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<sup>1</sup> The foregoing population and other service for KOB are based on engineering data submitted as an offer of proof (WABC Ex. 101, pp. 31-34, 53; R. 116-119, 138; WABC Ex. 102, R. 139-149). See p. 41, fn. 1, supra.

operations of this type and have accordingly abandoned the dual Class I approach as a means of providing additional skywave service in the west, not only on 660 kc and 880 kc, but on the other channels on which duplicate use was permitted in Docket 6741.

"Having concluded in Docket 6741 to defer action on 660 kc and to require the new Class II-A operation on 880 kc to protect the existing 0.5 mv/m 50% skywave contour of station WCBS (thus fully protecting the existing usable service contours of both NBC and CBS), it is apparent that the different action which we took in Docket 6584 on the one hand, and in Docket 6741 on the other, does not (in the language used by us in Issue 2 and by the Court in its 1960 decision) provide 'facilities to the ABC Network in New York on a basis which is fair and equitable in comparison with other radio networks,' and that this fact, in the light of intervening developments and the evidence here adduced, and the Court's 1960 statement that ABC should not be required to share a channel if the other networks were subsequently given full use of their channels, requires us to vary the conclusion heretofore reached in 1958 that two Class I facilities should be permitted on 770 kc.

"After carefully considering the evidence here adduced and the policies enunciated in Docket 6741, we have concluded (a) to amend Rule 3.22(a) by adding Channel 770 to the eleven channels there listed and to provide for an unlimited time Class II-A assignment thereon in the state of New Mexico, and (b) to abandon on 770 kc, as we have on the other 24 U.S. Class I-A channels in Docket 6741, the dual Class I 'dislocation' approach to the skywave shortage problem in the west, expecting that problem to be alleviated by the primary service authorized on the 12 channels on

which we are permitting Class II-A operations, and realizing that the remaining 12 U.S. Class I-A channels on which action has been deferred will be available for superpower or Class II-A use at a later date.

"We thus conclude that the public interest will be served (a) by granting the application of American Broadcasting-Paramount Theatres, Inc. for renewal of license of Station WABC (BR-107) as a Class I facility on 770 kc, 50 kw, U, New York, N. Y., subject to the right of Hubbard Broadcasting, Inc., to a hearing on its pending application for 770 kc in New York City in the event Hubbard Broadcasting, Inc. elects to prosecute said application in view of the conclusions here reached, and (b) by denying the application of Hubbard Broadcasting, Inc. for Class I facilities on 770 kc in Albuquerque, N. Mex. (BMP-1738), with leave to Hubbard Broadcasting, Inc. to amend that application to request a construction permit and license as a Class II-A station on 770 kc (50 kw, U, DA-N), in lieu of its present STA Class II operation on 770 kc (50 kw day, 25 kw night, DA-N)."

### CONCLUSION

Although clearer language than this Court used in 1960 (108 U.S. App. D.C. 83, 87-88) would be difficult to draft, its meaning and the reasons therefor have not apparently been fully comprehended by the Commission. ABC accordingly requests this Court to reaffirm the fact it meant what it said when it stated in 1960 that ABC should not be required "to share a channel if other networks are given full use of clear channels," and that "the Commission should seek to provide channel facilities to the ABC network which is fair and equitable in comparison with other networks." And to that end ABC requests this Court, as it did in its September 27, 1956 Order in Case No. 12,883 (14 RR 2020),



to direct the Commission within 60 days to carry out this Court's 1960 mandate, either (a) by granting KOB Class II-A rather than Class I rights on 770 kc (50 kw, U, DA-N), or (b) by placing KOB on one of the other eleven channels broken down for Class II-A duplication in Docket 6741. If the latter approach is used, special consideration should be given to 1180 kc, the frequency from which KOB was shifted at the time of the NARBA shuffle in 1941 (thus giving rise to the so-called "KOB problem"), and which is now available (as it was not in 1941) for Class II-A duplication in the Rocky Mountain area.

Respectfully submitted,

JAMES A. McKENNA, JR.

VERNON L. WILKINSON

McKenna & Wilkinson  
1735 DeSales Street, N. W.  
Washington, D. C. 20036

*Attorneys for  
Petitioner-Appellant*

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APPENDIX A

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FEDERAL COMMUNICATIONS COMMISSION RULES

Immediately prior to the Commission's decision of September 3, 1958 in Docket 6584 (25 FCC 683), Rules 3.21(a), 3.22(a), and 3.25(a) were worded in pertinent part as follows:

**Section 3.21. Three classes of standard broadcast channels —**  
(a) **Clear channel.** A clear channel is one on which the dominant station or stations render service over wide areas and which are cleared of objectionable interference within their primary service areas and over all or a substantial portion of their secondary service areas.

**Section 3.22. Classes and power of standard broadcast stations —** (a) **Class I station.** A Class I station is a dominant station operating on a clear channel and designed to render primary and secondary service over an extended area and at relatively long distances.

**Section 3.25. Clear channels: Class I and II stations.** The frequencies in the following tabulations are designated as clear channels and assigned for use by the classes of stations given:

(a) To each of the channels below there will be assigned one Class I station and there may be assigned one or more Class II stations operating limited time or daytime only: 640, 650, 660, 670, 700, 720, 750, 760, 770, 780, 820, 830, 840, 870, 880, 890, 1020, 1040, 1100, 1120, 1160, 1180, 1200, and 1210 kilocycles. The power of the Class I stations on these channels shall not be less than 50 kilowatts.

As a result of actions taken September 3, 1958 in Docket 6584 (25 FCC 805) and in the Clear Channel Proceeding (31 FCC 565, 603-605), those sections were modified to read as follows:

**Section 3.21. Classes of standard broadcast channels and stations.**

(a) Clear channel. A clear channel is one on which the dominant station or stations render service over wide areas, and which are cleared of objectionable interference within their primary service areas and over all or a substantial portion of their secondary service areas. Stations operating on these channels are classified as follows:

(1) Class I station. A Class I station is a dominant station operating on a clear channel and designed to render primary and secondary service over an extended area and at relatively long distances. Its primary service area is free from objectionable interference on other stations on the same and adjacent channels, and its secondary service area free from interference except from stations on adjacent channels, and from stations on the same channel in accordance with the channel designation in §§ 3.25 or 3.182. The operating power shall not be less than 10 kilowatts nor more than 50 kilowatts. (Also see § 3.25(a) for further power limitation.)

(2) Class II station. A Class II station is a secondary station which operates on a clear channel (see § 3.25) and is designed to render service over a primary service area which is limited by and subject to such interference as may be received from Class I stations. Whenever necessary a Class II station shall use a directional antenna or other means to avoid interference with Class I stations and with other Class II stations, in accordance with § 3.182 (and § 3.22 in the case of Class II-A stations). Class II stations are divided into three groups:

(i) Class II-A station. A Class II-A station is an unlimited time Class II station operating on one of the clear channels listed in § 3.22 and assigned to a community within a state specified in the Table contained in that section. A Class II-A station shall operate with power of not less than 10 kilowatts nighttime nor more than 50 kilowatts at any time.

**Section 3.22. Assignment of Class II-A stations.**

(a) Table of assignments. One Class II-A station may be assigned on each channel listed in the following table within the designated State or States:

Channel (kc)	Existing Class I Station	State(s) in which Class II-A assignment may be applied for
670	WMAQ Chicago	Idaho
720	WGN Chicago	Nevada or Idaho
780	WBBM Chicago	Nevada
880	WCBS New York	North Dakota, South Dakota, or Nebraska
890	WLS Chicago	Utah
1020	KDKA Pittsburgh	New Mexico
1030	WBZ Boston	Wyoming
1100	KYW Cleveland	Colorado
1120	KMOX St. Louis	California or Oregon
1180	WHAM Rochester	Montana
1210	WCAU Philadelphia	Kansas, Nebraska, or Oklahoma

### Section 3.25. Clear channels; Classes I and II stations.

The frequencies in the following tabulations are designated as clear channels and assigned for use by the Classes of stations given:

(a) On each of the following channels, one Class I station will be assigned, operating with power of 50 kw: 640, 650, 660, 670, 700, 720, 750, 760, 780, 820, 830, 840, 870, 880, 890, 1020, 1030, 1040, 1100, 1120, 1160, 1180, 1200, and 1210 kc. In addition, on the channels listed in this paragraph, Class II stations may be assigned as follows:

(1) On 670, 720, 780, 880, 890, 1020, 1030, 1100, 1120, 1180, and 1210 kc, one Class II-A unlimited time station, assigned and located pursuant to the provisions of § 3.22.

(2) On the channel 750 kc, an unlimited time Class II station located at Anchorage, Alaska.

(3) On the channel 760 kc, an unlimited time Class II station located at San Diego, California.

(4) On any of the channels listed in this paragraph (to the extent consistent with the assignments provided in subparagraphs (1), (2), and (3) of this paragraph), unlimited time Class II stations located in Alaska, Hawaii, Virgin Islands, Puerto Rico, which will not deliver more than 5 microvolts per meter groundwave day or night or 25 microvolts per meter 10 percent time skywave at night at any point within the continental limits of the United States excluding Alaska . . .

Note 3: On the frequency 770 kc, two Class I stations may be assigned.

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BRIEF FOR APPELLANT-PETITIONER IN NUMBERS 18,045 and 18,078

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## United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Nos. 17,567 and 18,046

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AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,  
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA  
and  
FEDERAL COMMUNICATIONS COMMISSION,  
Respondents-Appellee,  
HUBBARD BROADCASTING, INC.,  
Intervenor.

United States Court of Appeals  
for the District of Columbia Circuit

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Nos. 18,045 and 18,078

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FILED NOV 25 1963

HUBBARD BROADCASTING, INC.,  
Appellant-Petitioner,

*Nathan J. Paulson*  
CLERK

v.

FEDERAL COMMUNICATIONS COMMISSION  
and  
UNITED STATES OF AMERICA,  
Appellee-Respondents,  
AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,  
Intervenor.

---

Appeal and Petition  
From the Federal Communications Commission

Of Counsel:  
SPEARMAN AND ROBERSON  
1023 Munsey Building  
Washington, D. C.

FRANK U. FLETCHER  
ROBERT L. HEALD  
EDWARD F. KENEHAN  
1023 Munsey Building  
Washington, D. C.  
Attorneys for  
Hubbard Broadcasting, Inc.



(i)

## STATEMENT OF QUESTIONS PRESENTED

The parties have agreed that these cases raise the following questions:

1. Whether the Commission's action which continued the operating authority of WABC while conditionally denying the application of WABC for renewal of license:

(a) deprives Hubbard Broadcasting, Inc. of a full and fair hearing of its New York application, to which it is entitled, under Section 309 of the Communications Act of 1934, as amended, and Sections 5, 7, 8, and 9 (b) of the Administrative Procedures Act; and

(b) is in contravention of Section 307(d) of the Communications Act of 1934, as amended.

2. Whether the action of the Commission in affording American Broadcasting-Paramount Theatres, Inc. an opportunity to file an application for modification of facilities on the frequency 770 kc exceeds the Commission's statutory authority.

3. Whether the Commission's ultimate conclusion that American Broadcasting-Paramount Theatres, Inc. should be allowed to file an application for modification of facilities on the frequency 770 kc is arbitrary and capricious and contrary to the Commission's rules.

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# **United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Nos. 18,045 and 18,078

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**HUBBARD BROADCASTING, INC.**  
Appellant-Petitioner,  
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and  
**UNITED STATES OF AMERICA,**  
Appellee-Respondents,  
**AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,**  
Intervenor.

---

Appeal from and Petition for Review of a Decision  
of the Federal Communications Commission

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**BRIEF FOR APPELLANT-PETITIONER IN NUMBERS 18,045 and 18,078**

## JURISDICTIONAL STATEMENT

These are consolidated cases appealing from a Decision of the Federal Communications Commission (R. 502-510) released July 8, 1963, granting for an indefinite period the application of American Broadcasting-Paramount Theatres, Inc., Intervenor, for a renewal of license of Standard Broadcast Station, WABC, New York, New York, and a petition for review of that same Decision.

The "Notice of Appeal" was filed August 7, 1963, pursuant to the provisions of Section 402(b)(1) and 402(b)(6) of the Communications Act of 1934, as amended, 66 STAT. 718 (1952); 47 USCA 402(b)(1), 402(b)(6) (Supp. 1962) and Rule 37 of the Rules of this Court. The "Petition to Review" was filed on August 27, 1963, pursuant to the provisions of Section 402(a) of the Communications Act of 1934, as amended, 66 STAT. 718 (1952); 47 USCA 402 (a) (Supp. 1962) and under Sections 2 and 3 of the Judicial Review Act of 1950, 64 STAT. 1129 (1960); 5 USCA 1032, 1033 (Supp. 1962).

## STATEMENT OF THE CASE

On September 3, 1958, the Federal Communications Commission adopted an order amending Section 3.25 (a) of its rules to provide that "On the frequency 770 kc two Class I stations may be assigned," whereas previously only one such station could operate on that channel. The reasons for adopting this amendment were set forth in a Commission Decision (Albuquerque Broadcasting Co.,

et al, Docket Nos. 6584 and 6585, 16 Pike & Fischer RR 765 (1958), adopted simultaneously therewith. This Decision ordered that:

" . . . Albuquerque Broadcasting Company is granted leave to amend its application (File No. BMP-1738) for modification of construction permit to specify nighttime operation of Station KOB, Albuquerque, New Mexico, on the frequency 770 kc., with power of 50 kilowatts, employing a directional antenna with the parameters specified in Paragraph 22 of the Findings of Fact, *supra*; American Broadcasting Paramount Theatres, Inc., is granted leave to file an application for authority to make changes in the operation of Station WABC, New York, New York, on 770 kilocycles, to specify nighttime operation, employing a directional antenna with the parameters specified in Paragraph 22 of the Findings of Fact, *supra*; American Broadcasting-Paramount Theatres, Inc., is directed to file its application for renewal of license (File No. BR-167), expiring June 1, 1960, of Station WABC, New York, New York, not later than July 1, 1959; . . ."

On May 27, 1960, these actions of the Commission were affirmed by this Court. American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission, 108 U. S. App. D. C. 83, 280 F. 2d 631 (1960).

Prior to the May 27, 1960 decision of this court, Albuquerque Broadcasting Co. (now the appellant-petitioner Hubbard Broadcasting, Inc.) <sup>1/</sup> had amended its application for modification of the KOB construction permit in accordance with the Commission's September 3,

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<sup>1/</sup> KSTP, Inc., succeeded Albuquerque Broadcasting Co. as the licensee of Station KOB in 1960 and in 1962 the name of appellant-petitioner was changed to Hubbard Broadcasting, Inc. The name changes have no bearing on the matters here under review. Hereinafter, appellant-petitioner will be referred to as Hubbard without regard to the time of the event or circumstance being discussed.



1958, Decision (amendment accepted for filing on March 27, 1959) and American Broadcasting-Paramount Theatres, Inc., (appellant-petitioner in Cases 17, 567 and 18, 046) had filed its application for renewal of the WABC license (filed on June 30, 1959). American Broadcasting-Paramount Theatres, Inc. (ABC) has never filed an application for authority to make changes in the operation of Station WABC. However, on February 23, 1960, Hubbard (then KSTP, Inc.) filed an application for a construction permit for a new AM station in New York to operate on the frequency 770 kilocycles with 50 kilowatts of power and employing a directional antenna at night. As indicated, the application requests the frequency presently utilized by ABC's AM station WABC, New York City, and is mutually exclusive with the pending application (File No. BR-167) for renewal of that station's license. It was accepted for filing by the Commission in due course and assigned the File Number BP-13932.

No action was taken by the Commission on the foregoing applications (including Hubbard's New York City application) until August 22, 1960, when a letter was addressed to Hubbard, (then KSTP, Inc.) and ABC pursuant to the then applicable Section 309(c) of the Communications Act. This letter advised, among other things, that Hubbard's New York application for the facilities of Station WABC and the WABC renewal application were mutually exclusive and would be designated for hearing. No mention was made of Hubbard's application for modification of the KOB construction permit in the August 22, 1960, letter.

In response to the Commission's letter, Hubbard, on September 19, 1960, filed a petition with the Commission which pointed out that the KOB modification application was also mutually exclusive with the WABC renewal application and requested that the three applications, the KOB modification, the WABC renewal, and Hubbard's New York application, be consolidated for hearing in the same proceeding. On July 11, 1961, the Commission issued a public notice (FCC 61-866), pursuant to Sections 1.354(c), 1.106(b)(1), and 1.361(b) of its Rules, stating that as of August 14, 1961, Hubbard's New York application would be ready and available for processing and only competing applications on file by that date would be entitled to be consolidated for hearing with that application.

Thereafter, by Memorandum Opinion and Order released August 4, 1961, the Commission designated the KOB modification application and the WABC renewal application for hearing in a consolidated proceeding to determine, in view of certain language contained in the May 27, 1960, opinion of this Court (American Broadcasting-Paramount Theatres, Inc., supra,) " . . . whether the consideration of providing facilities to the ABC Network in New York on a basis which is fair and equitable in comparison with other radio networks should vary the conclusion. . . " reached by the Commission in its September 3, 1958, Decision with respect to the use of the frequency 770 kc. The same Memorandum Opinion and Order denied Hubbard's September 19, 1960,

petition to consolidate insofar as it requested that Hubbard's New York City application be designated for hearing in the same consolidated proceeding because of its mutual exclusivity with the application of American Broadcasting-Paramount Theatres, Inc., for renewal of the license of AM Station WABC, New York, New York. Instead of so designating Hubbard's New York City application, the Commission ordered that further action on it be withheld. Hubbard filed a Notice of Appeal with this Court under its former name of KSTP, Inc. (No. 16577). The appeal was dismissed on October 27, 1961, upon motion of the Commission and the United States of America, and a Petition for Rehearing was denied on January 15, 1962.

Thereafter, the hearing on Hubbard's application for modification of the KOB construction permit and the WABC renewal application was held, and on July 8, 1963, the Commission released the Decision here under review. The July 8, 1963, Decision speaks in terms of denying WABC's renewal application, but in reality it grants that application and renews the WABC license for an indefinite period. The Decision also authorizes American Broadcasting-Paramount Theatres, Inc., to file an application for authority to make changes in the operation of Station WABC in the manner specified in Paragraph 22 of the Commission's September, 1958 Decision, in effect holding that Hubbard's New York City application will be designated for hearing

with that application but not with the WABC renewal application.<sup>2/</sup> In addition, the July 8, 1963, Decision authorizes the continued non-directional operation of Station WABC, which operation causes interference to Station KOB as authorized prior to and by the July 8, 1963, Decision.

### STATUTE INVOLVED

The statute involved in this appeal is the Communications Act of 1934, as amended. The pertinent provisions thereof are printed in the Appendix to this brief.

### STATEMENT OF POINTS

The Commission's July 8, 1963, Decision, by granting the WABC renewal application, unlawfully denies Hubbard's application for a construction permit for a new station to operate on the frequency 770 kilocycles in New York City.

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<sup>2/</sup> The July 8, 1963, Decision directed ABC to file the application for "modification of facilities" (specifying the conforming directional antenna system) within thirty days. Subsequently, the Commission granted ABC's motion to stay the thirty-day filing period until conclusion of the judicial review of the July 8, 1963 Decision but thereafter, on October 16, 1963, vacated the stay subject to the approval of this Court. On November 12, 1963, this Court ordered that the matter be held in abeyance pending hearing on the merits of the several cases here involved. In its Memorandum Opinion and Order (released October 17, 1963) vacating the stay for filing the WABC directional application, the Commission made it pointedly clear that, if its July 8, 1963, Decision is affirmed by the Court, Hubbard's New York City application will not be comparatively considered with the WABC renewal application.

## SUMMARY OF ARGUMENT

By its Decision of July 8, 1963, the Commission has granted an application of ABC for the renewal of the license of Station WABC which operates on the frequency 770 kilocycles in New York, New York. At the time the WABC renewal was designated for hearing, Hubbard had on file with the Commission an application for a construction permit for a new station to operate on the frequency 770 kilocycles in New York City. Although the two applications were mutually exclusive, and recognized as such by the Commission, the Commission refused to designate Hubbard's application for hearing either with the WABC renewal application or otherwise. Accordingly, the Commission's action granting the WABC renewal was also an action denying the Hubbard application without a hearing and, therefore, unlawful within the meaning of the Ashbacker doctrine [Ashbacker v. Federal Communications Commission, 326 U.S. 327, 90 L. Ed. 108 (1945)].

## ARGUMENT

## I

Preliminary Statement

As this Court well knows, the history of this litigation dates back to 1941 when the reallocation of assignments to United States stations was required to be effected in accordance with the then recently adopted North American Regional Broadcasting Agreement.

Over the years until 1958, in its efforts to find a permanent frequency for Station KOB, Albuquerque, New Mexico, the Commission was faced with the problem of having one too many existing stations for the number of Class I channels available under its allocation rules and standards. Both KOB and what is now WABC, New York City, were operating on 770 kilocycles and continually seeking authority to remain there. The rules, however, provided that only one station could operate on that channel. No one knows better than this Court the impasse that ensued.

On September 3, 1958, the Commission eliminated the cause of the impasse by amending the rule involved [Section 3.25(a)] to provide for the assignment of two Class I stations on the frequency 770 kilocycles. The rule now reads that "two Class I stations may be assigned" (underscoring supplied) on the frequency. The Order of the Commission adopting this simple but significant amendment was affirmed by this Court in its May 27, 1960 opinion in American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission, 108 U.S. App. D.C. 83, 280 F. 2d 631 (1960). When this amendment became finally effective, as it did upon affirmation by this Court, the KOB-WABC history became a dead issue. As a result of the amendment, normal licensing procedures were restored with respect to the frequency 770 kilocycles, and the frequency became subject to application--for renewal, for change in facilities, or for new stations--without regard to what had transpired over the past twenty some years.



The situation created by the rule amendment here involved was not unlike that created by the Commission when it deleted VHF Channel 10 from Bakersfield, California, following a rule making proceeding subsequently brought before this Court for review. See Transcontinent Television Corporation v. Federal Communications Commission, \_\_\_\_ U. S. App. D. C. \_\_\_\_, 308 F. 2d 399 (1962). In the Bakersfield case, at the time the Commission's Table of Television Assignments (Section 3.606 of the Rules) was amended, Transcontinent held a license which specified Channel 10, and the Court held in effect that future licensing proceedings in Bakersfield must be conducted in the light of the rule change deleting that channel.

Here there was also a change in assignment rules during a license period, and nothing more. When the WABC license was last renewed, more than six years ago on May 29, 1957, Section 3.25(a) of the Rules provided that only one Class I station could be assigned to the frequency 770 kilocycles. However, during the license period that followed (June 1, 1957 - June 1, 1960), the Commission amended the rule to provide for the accommodation of two Class I stations on the frequency. Then in keeping with required and well-established licensing procedures and practices, it issued instructions which, it has been assumed, were intended to facilitate the implementation of the new assignment rule at the earliest possible time. WABC was directed to file a renewal application for the license period June 1, 1960 -

June 1, 1963, not later than July 1, 1959, and was granted leave to file an application for authority to change its facilities in a manner that would permit two Class I stations (one in Albuquerque, New Mexico, and one in New York City) to operate on 770 kilocycles. In addition, Station KOB was granted leave to specify, in its then pending application, facilities compatible with the two-station plan of operation the Commission had found would best serve the public interest. (Albuquerque Broadcasting Co., et al, Docket Nos. 6584 and 6585, 16 Pike & Fischer RR 765, September 3, 1958.)

The meaning of these instructions were, or should have been, clear to all concerned, including ABC. Among others, their purpose was to put the parties (and the public), and particularly ABC, on notice that the rules had been changed and that the conditions for licensing stations for operation on the frequency 770 kilocycles would be different for the license period June 1, 1960 - June 1, 1963 (and for subsequent periods) than they were for the period June 1, 1957 - June 1, 1960. While the new rule did not foreclose the filing and prosecution of an application for renewal of WABC's non-directional operation, the obvious inference was, as it should have been, that such an application of necessity would be denied because of mutually exclusive interference with KOB, previously determined to be contrary to the public interest.

For reasons best known to itself, ABC elected to ignore the Commission's instructions. While it did file its application for renewal

of the WABC license as directed, it has never filed, and has continuously objected to filing, an application for authority to change its facilities to conform with the public interest determinations of the Commission as announced in its September 3, 1958, Decision, which Decision was later affirmed by this Court. As it rightfully could do, ABC elected to stand on its application for renewal of license on the same terms and conditions as specified in the license covering the period, and only the period, June 1, 1957 - June 1, 1960. In so electing, ABC unquestionably realized that another applicant might file an application for a new station in New York City to operate on the frequency 770 kilocycles but with the directional parameters specified in the Commission's September 3, 1958, Decision, and that such an application would be entitled to comparative consideration with the WABC non-directional application.

This is precisely what happened. On February 23, 1960, well in advance of the expiration of the WABC license on June 1, 1960, Hubbard (then KSTP, Inc.) filed an application for a new station to replace WABC on 770 kilocycles in New York City. The Hubbard application, however, conformed with the specifications announced in the Commission's September 3, 1958 Decision and was compatible with the operation for KOB also specified in that Decision.

As filed, Hubbard's New York City application was mutually exclusive with the WABC renewal application, which in turn

was mutually exclusive with the amended KOB application. The three applications were co-pending, none of them having been granted as of June 1, 1960, when ABC's license for the operation of station WABC expired by its terms, and they all should have been designated for hearing in the same comparative proceeding. There was no purpose to be served by waiting longer to designate the applications since as of June 1, 1960, WABC's only operating authority was the holdover provision of Section 307(d), which, as this Court has explained (Transcontinent Television Corporation v. Federal Communications Commission, *supra*, at 344). and as the statute makes clear, is for the purpose of permitting continuity of operation, while the renewal application is being processed. Furthermore, the Congressional direction of Section 307(d) is that action on renewal applications be expedited, and in this case there was a particular need for expedition, not simply because of WABC's renewal, but because of the Hubbard applications, both of which were in conflict with the renewal. Also, under the statutory licensing scheme, what was basically involved at that time was the determination of who was to be the regular licensee for the three-year period June 1, 1960 - June 1, 1963, or for whatever portion of that period remained after all required hearings and related procedures were

concluded. <sup>3/</sup>

For some reason the Commission has continually refused to completely face up to its responsibilities in connection with the processing of the applications here involved. Initially, it did recognize that Hubbard's New York application was mutually exclusive with the WABC renewal and so advised the applicants, pointing out that, because of the mutual exclusivity, the two applications would have to be heard in a comparative proceeding to determine which would better serve the public interest, convenience, and necessity (R. 1030-1031). Later, however, after Hubbard called its attention to the fact that the KOB application was also mutually exclusive with the WABC renewal (R. 908-912), the Commission reversed its field (R. 985-992). Since then it has proceeded on the basis of KOB-WABC mutual exclusivity only and has continuously to the present time taken the position that Hubbard's New York application is not entitled to a hearing with

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<sup>3/</sup> Section 307(d) also provides that a regular license for a broadcast station cannot be granted for more than a three-year term. Practicalities, therefore, do enter the picture when an application is filed for the facilities of an existing station at renewal time. Under such circumstances, it must be considered that the applicants are competing for the privilege of operating a station on the frequency involved during the three-year period, or remaining portion thereof, immediately following final action of the Commission. During the intervening period, the existing licensee continues to operate the station pursuant to the limited holdover operating authority extended by Section 307(d).

the WABC renewal. <sup>4/</sup>

## II

### The Commission's Action in This Proceeding Unlawfully Denies Hubbard's New York City Application Without a Hearing

To merely state what occurred in the process of reaching the July 8, 1963, Decision here on appeal is enough to expose the Commission's errors. Basically, it is Hubbard's contention that the Commission has flagrantly ignored its own responsibilities and the well-established rights Hubbard acquired when its New York City application was filed and thus acquired co-pending, mutual exclusivity status vis-a-vis the WABC renewal application. " . . . Where two

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<sup>4/</sup> The Commission concedes the validity of the principle that an applicant for the facilities of an existing station is legally entitled to a comparative hearing with that station's renewal but stubbornly refuses to apply the principle in this case. Thus it says in the Order of August 4, 1961, designating the KOB modification and the WABC renewal applications for hearing (R. 987):

"In view of the doctrine expressed by the United States Supreme Court in Ashbacker Radio Corp. v. Federal Communications Commission, (*supra*), we have consistently held that an application for renewal of a broadcast license must be designated for comparative hearing with any other mutually exclusive applications then pending before the Commission. In re Hearst Radio, Inc. (WBAL), 3 Pike & Fischer RR 731 (1947); Robert E. Bollinger, 13 Pike & Fischer RR 562 (1959); Radio Voice of New Hampshire, Inc. (WMUR-TV), Order of May 1, 1957 (FCC 57-433); Oroville Broadcasters, (KMOR), Order of November 5, 1958 (FCC 58-1041)."

Later in the same Order, however, the Commission says that, while it will provide Hubbard a comparative hearing "with ABC," there will be no hearing between Hubbard's New York application and the WABC renewal. (Paragraph 12, R. 990).



bona fide applications are mutually exclusive, the grant of one without a hearing to both deprives the loser of the opportunity Congress chose to give him." Ashbacker v. Federal Communications Commission, 326 U.S. 327, 333, 90 L. Ed. 108, 113 (1945).<sup>5/</sup> It follows that when the Commission does grant one of two mutually exclusive applications without affording the other an opportunity to be heard comparatively, the result is denial of the one not heard.

There is no need to argue the obvious. If the WABC renewal application was in fact granted by the July 8, 1963, Decision, Hubbard's New York application has been denied, contrary to the requirement of Ashbacker and of Section 309 of the Communications Act of 1934, as amended, which directs the Commission to designate for hearing any application it cannot grant without a hearing. Here the Commission admitted that a hearing on Hubbard's application was required because it was mutually exclusive with the WABC renewal.<sup>6/</sup>

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<sup>5/</sup> The Commission has paraphrased this doctrine as follows:

" . . . the philosophy of the Ashbacker case is quite clear. It states that the Commission should not grant one of two or more pending applications where the grant of one would preclude the grant of the others pending . . . " In re Collier Electric Co., 14 Pike & Fischer RR 848, 850 (1956).

<sup>6/</sup> See Section 309(b) as it read prior to amendment of the entire section in 1960 and Section 309(e) of the present legislation. Both are included in the Appendix to this brief.

As explained above, however, no hearing was held nor was Hubbard afforded an opportunity for a hearing on its New York City application.

The only question of any significance, therefore, is whether the July 8, 1963, Decision amounted to a grant or a denial of the application for renewal of the WABC license, and it is in connection with this phase of the Decision that the Commission has employed a screen of semantics to disguise the true effect of its action. The ordering clause (R. 841) is that "the application of American Broadcasting-Paramount Theatres, Inc., for renewal of the license of Station WABC, New York, New York, IS DENIED, without prejudice to reconsideration if ABC files, within 30 days of the release date hereof, an application for modification of facilities on the frequency 770 kc in conformity with the parameters specified in paragraph 22 of the September, 1958, Decision herein (25 FCC 683, 16 RR 765)."

Without discussing the propriety of delegating to a private party the right to determine whether a Commission action should or should not be reconsidered, it is nevertheless evident that the foregoing language is an outright grant of the WABC renewal--not for a three-year term but, for all practical purposes, forever. As explained above, the time when ABC must make a decision as to the filing of the so-called modification application has already been deferred until the instant cases are heard on their merits by this Court. Furthermore, ABC has served notice that even then it will not, and in fact cannot, file

such an application. See pleading filed with the Court on October 25, 1963, styled "ABC's Opposition to Respondents' Motion," which pleading was in response to respondents' motion to permit partial reconsideration of the July 8, 1963 decision.

In the meantime the Commission's July 8, 1963, action permits ABC to continue operating WABC, and if for no other reason than this, it amounts to a grant of the renewal application. The important consideration, however, is that legally the Commission cannot entertain or consider an application for modification of facilities after the station's regular license term has expired until after it disposes of the renewal application. Then, of course, it can consider the modification application only if the renewal application was granted.

Section 307 (d) of the Communications Act provides that "No license granted for the operation of a broadcasting station shall be for a longer term than three years. . . ." It also provides that upon the expiration of any three-year term an application for renewal of license must be filed if the licensee wishes to continue to operate the station and that "Pending any hearing and final decision on such an application, and the disposition of any petition for rehearing pursuant to Section 405, the Commission shall continue such license in effect."

That the three-year license term provision of Section 307(d) is absolute, and that a licensee seeking an additional three-year license term by the renewal process is no more favorably positioned than the

new applicant seeking to replace him, has never been more unequivocally recognized than by this Court. In Transcontinent Television Corporation v. Federal Communications Commission, *supra*, at 341, 342, it was pointed out that:

" . . . significance . . . must be attached to the provisions of the Act (1) indicative of an unwillingness on the part of Congress to permit a broadcasting license for a term in excess of three years, (2) that no license shall be construed to create any right beyond its terms, conditions, and periods, (3) that the applicant shall waive any claim to the use of any particular frequency 'because of the previous use of the same, whether by license or otherwise,' and (4) that 'the station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof . . . ." (Foot notes omitted.)

The Transcontinent decision clearly stands for the proposition that modification rights attach to a radio license (broadcast or otherwise) only during a regular license term. While in Transcontinent the Court was concerned with the question as to whether the Commission must follow the provisions of Section 316(a) of the Communications Act in order to force a modification of license after the expiration of a regular license term, the obvious corollary of the holding to the contrary is that after a regular three-year license term expires there is nothing to modify, whether modification is sought by the Commission pursuant to Section 316(a) of the Act or by application pursuant to Sections 308 and 309.

Relating this to the instant situation, it follows that unless

the July 8, 1963, Decision has granted the WABC renewal and thus authorized a new regular license term, any application for modification of the WABC New York facilities, even if it is filed, would be meaningless and of no legal effect. The Commission has, in fact, recognized that this is the case. In a Report and Order released April 25, 1961, In re National Broadcasting Company, Inc., et al (Docket No. 14091, et al, FCC 61-530, 3326) applications of NBC for renewal of the licenses of WRC-TV, Washington, D. C. and WRCV-TV, Philadelphia, Pennsylvania, were under consideration along with applications of The Chronicle Publishing Company and Philco Broadcasting Company for new stations to replace WRC-TV and WRCV-TV, respectively, and with applications for consent to the assignment of the WRC-TV and WRCV-TV licenses to RKO General, Inc. In denying a request by RKO General that consideration of the applications for renewal of the licenses be deferred pending action on the assignment applications, the Commission commented as follows:

"NBC's licenses to operate broadcast stations in Philadelphia and Washington, D. C. expired by their terms on August 1, 1960 and October 1, 1960, respectively. It is authorized to continue to operate said stations by virtue of its having filed applications for renewal of the licenses therefor and by the provisions of Section 307(d) of the Communications Act and 9(b) of the Administrative Procedure Act. Accordingly, insofar as those stations are concerned, NBC has nothing to assign unless and until the Commission renews its licenses for those stations. Since Philco and Chronicle have filed applications for permits to construct new tele-

vision stations on the same channels for which NBC has filed renewal applications for Philadelphia and Washington, D. C., they are, respectively, mutually exclusive and none can be granted without a comparative hearing. Ashbacker v. FCC, 326 U. S. 327."

The same reasoning applies here, the only difference being that a potential application for modification of license is involved rather than an application for assignment. But if NBC in the above situation had nothing to assign, then ABC here has nothing to modify until after its renewal application has been granted. So long as the WABC renewal remains undisposed of, ABC's sole authority for operation of Station WABC is that limited authority provided by Sections 307(d) of the Communications Act and 9(b) of the Administrative Procedures Act. The meaning of these provisions is clear. They only extend the operating authority for an existing station for the limited purpose of permitting the Commission to dispose of a renewal application. They do not extend operating authority to permit the Commission to seek the filing of some other application (i. e., for change of facilities) and, after it is received, to consider and act on it in lieu of the renewal application.

The July 8, 1963, action of the Commission is either an action granting the WABC renewal application or it is a complete nullity. Hubbard respectfully submits that it is a grant of that application and, since it is a grant, it is also an unlawful denial of Hubbard's application for a 770 kilocycle station in New York City within



the meaning of Ashbacker.

If this Court approves the Commission's action with respect to the WABC renewal application in this proceeding, it will, for all practical purposes be also rendering useless one of the key regulatory provisions of the Communications Act. As former Commissioner Hennock said:

"The right of new applicants to seek the facilities of existing licensees upon the expiration of the license term must be protected if the Commission is to preserve one of the most fundamental principles of our entire broadcasting system, i. e., that a licensee does not acquire a permanently vested right to a frequency. The renewal procedure, designed to bring about the practical realization of this principle, insures a continuing opportunity for the licensing of all radio and television stations to the most qualified applicants." Dissenting statement of Commissioner Hennock in re Zenith Radio Corp., 8 Pike & Fischer RR 883, 894 (1953), rev'd Zenith Radio Corp. v. Federal Communications Commission, 93 U.S. App. D.C. 284, 211 F. 2d 629 (1953).

The importance of the renewal procedure established by Section 307(d) has also been recognized for other purposes and particularly for achieving efficient distribution and use of broadcast frequencies. In a recent Notice of Proposed Rule Making in re Amendment of Part 3 of the Commission's Rules regarding AM station assignment standards and the relationship between AM and FM broadcast services (Docket No. 15084, FCC 63-468, 35002), the Commission stated as follows:

"22. Although we do not propose any rules regarding AM-FM duopoly, we believe that there is another factor which will work naturally toward our long range goal of independent FM operation. As FM frequencies become more and more scarce, it is to be expected that there will be an inevitable increase in the number of competing applications filed at renewal time against dual AM-FM operators in the largest markets. In these situations, some dual AM-FM operators may well be vulnerable as against competing renewal applications, particularly if the existing licensee has been presenting the bare minimum of non-duplicated programming and has otherwise indicated that he regards his FM obligation as secondary to those in the AM field." (Underscoring supplied).

More recently, on November 11, 1963, Commissioner Robert T.

Bartley concluded an address to the Station Representatives Association in Cleveland, Ohio, (FCC Mimeo 43265) as follows:

"As Defense Commissioner, I have become acutely aware of another deficiency in our broadcast structure. Too many towns and counties are dependent for their local service on daytime only stations. Whereas, on the other hand, many metropolitan areas have several unlimited time stations, one of which blocks nighttime operation by the isolated daytime. This situation has developed because AM grew up, first, without any regulation, and later on by the 'demand' theory. But demands and requirements vary over the years. The Congress wisely recognized this, too, because it limits broadcast licenses to three-year terms. I urge the filing of applications in conflict with renewals when the proposed new service would better effectuate a more equitable distribution of facilities.

"I earnestly believe that such a movement could effect a more equitable distribution of facilities and at the same time relieve some of the excessive concentration of facilities in the more populous areas which already have more facilities than they need." (Underscoring supplied).

It is well recognized and understood that the Commission does not have the power or authority to secure the filing of broadcast applications or to otherwise directly achieve the construction and operation of stations to serve the public. Under the present regulatory system broadcast service can be made available to the public only through the application process and this process is effective only insofar as members of the public voluntarily file applications for authority to construct and operate stations. As indicated by the foregoing, the system will work properly only if such voluntary applications may be filed to seek the facilities of existing stations upon the expiration of their license terms. There is no other vehicle for the Commission to use in replacing ineffective or marginal licensees, in achieving compliance with desirable assignment and other policies, and in effectuating a more efficient and equitable distribution of radio frequencies and facilities.

It is the efficient and equitable distribution of facilities objective that is involved in this case. The Commission has found and concluded (Decision of September 3, 1958) that it is in the public interest for two stations to operate on the frequency 770 kilocycles, one in Albuquerque, New Mexico, and the other in New York City. ABC, however, has refused and continues to refuse, to conform the operation of station WABC and has thus far successfully frustrated implementation of the public interest objective. By this time it should be more than evident

that the Commission cannot force ABC to conform. The only solution is to permit the application process prescribed by Congress to take its normal course and, as applied here, this means that Hubbard's New York City application must be considered comparatively with WABC's 1959 renewal application, the objective being to grant one and deny the other. Any other approach, and particularly the approach adopted by the Commission in its July 8, 1963, Decision, will not only prolong this controversy for another twenty years but will also establish a policy of licensing broadcast stations in perpetuity contrary to the will of Congress as expressed in the Communications Act of 1934, as amended.

### CONCLUSION

For the foregoing reasons, Hubbard urges the Court to vacate and set aside the Commission's Decision of July 8, 1963, insofar as it purports to dispose of the application for renewal of the WABC license, and to instruct the Commission either to set the WABC renewal application for hearing comparatively with Hubbard's New York City application or to unconditionally deny the WABC renewal application with a view to granting the said

Hubbard application.

Respectfully submitted,

FRANK U. FLETCHER

ROBERT L. HEALD

EDWARD F. KENEHAN

Attorneys for Appellant-Petitioner  
Hubbard Broadcasting, Inc.

Of Counsel:

Spearman and Roberson

1023 Munsey Building  
Washington, D. C.

November 25, 1963

## APPENDIX

### STATUTES

Communications Act of 1934, as amended, Sept. 13, 1960,  
47 U. S. C. 151 et seq:

Sec. 307. (d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, and not exceed five years in the case of other licenses, if the Commission finds that public interest, convenience and necessity would be served thereby. In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is not directly material to the considerations that affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings. Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to Section 405, the Commission shall continue such license in effect. Consistently with the foregoing provisions of this subsection, the Commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes of stations, but the Commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, public interest, convenience, or necessity would be served by such action.

Sec. 308. (a) The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it: provided, that (1) in cases of emergency found by the Commission involving danger to life or property or due to damage to equipment, or (2) during a national emergency proclaimed by the President or declared by the Congress and during the continuance of any war in which the United States is engaged and when such action is necessary for the national defense or



otherwise in furtherance of the war effort, or (3) in cases of emergency where the Commission finds, in the non-broadcast services, that it would not be feasible to secure renewal applications from existing licensees or otherwise to follow normal licensing procedure, the Commission may grant construction permits and station licenses, or modifications or renewals thereof, during the emergency so found by the Commission or during the continuance of any such national emergency or war, in such manner and upon such terms and conditions as the Commission shall by regulation prescribe, and without the filing of a formal application, but no authorization so granted shall continue in effect beyond the period of the emergency or war requiring it: provided further, that the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

Sec. 309. (a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which Section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience and necessity would be served by the granting thereof, it shall grant such application.

Sec. 309. (e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other

parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

Sec. 316. (a) Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall have been given reasonable opportunity, in no event less than thirty days, to show cause by public hearing, if requested, why such order of modification should not issue: Provided, That where safety of life or property is involved, the Commission may by order provide for a shorter period of notice.

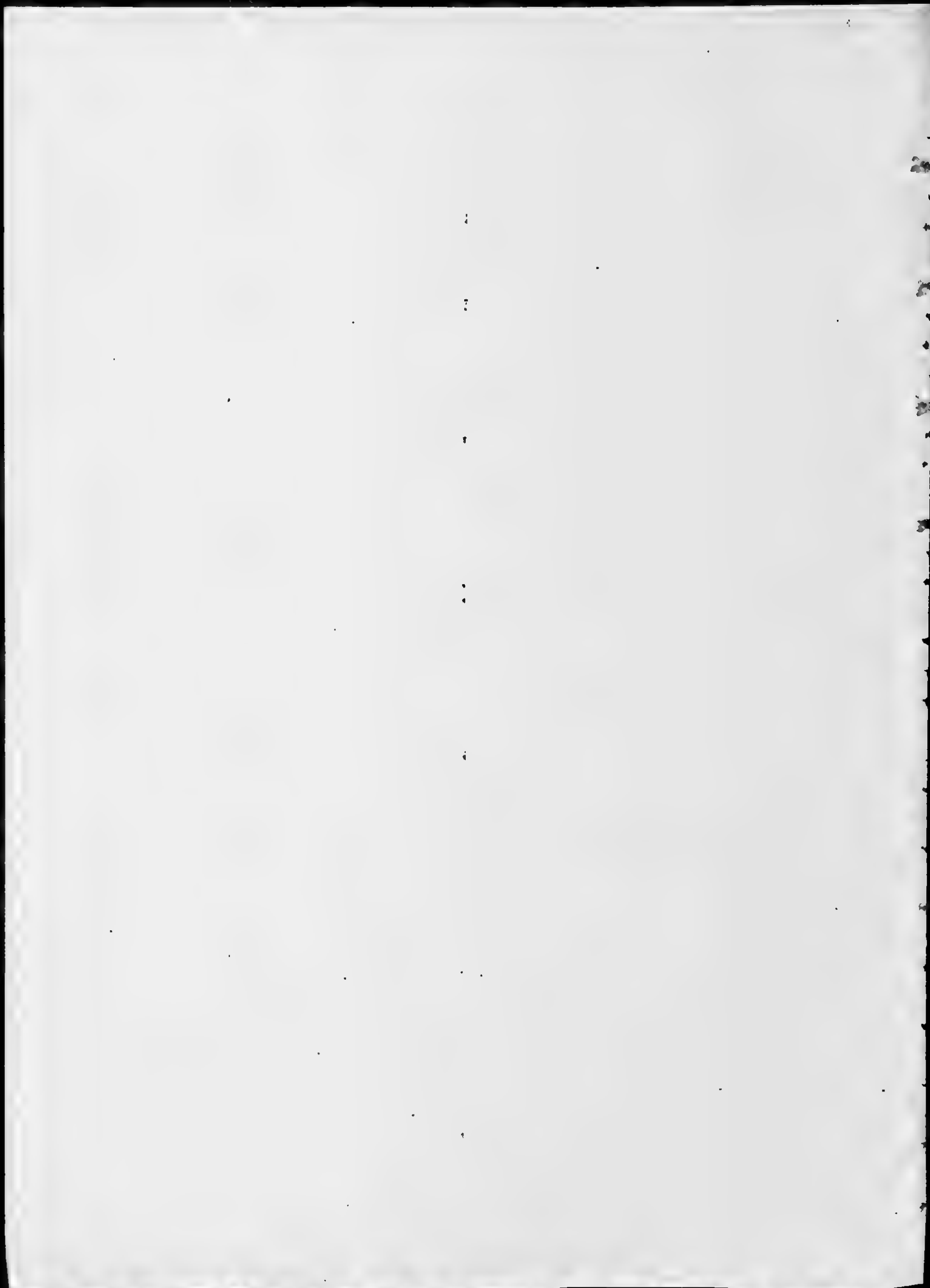
Communications Act of 1934, as amended (1952), 47 U. S. C. 151 et seq:

Sec. 309. (b) If upon examination of any such application the Commission is unable to make the finding specified in the subsection (a), it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. Such notice, which shall precede formal designation for a hearing, shall advise the applicant and all other known parties in interest of all objections made to the application as well as the source and nature of such objections. Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a), it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. The parties in interest, if any, who are not notified by the Commission of its action with respect to a particular application may acquire the status of a party to the proceeding thereon

by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant.

Administrative Procedure Act of 1946, as amended 5 U.S.C. 1001 et seq:

Sec. 9. (b) In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.



BRIEF FOR INTERVENOR

**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals  
for the District of Columbia Circuit

FILED DEC 24 1963

No. 17,567

*Nathan J. Paulson*  
CLERK

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,  
Petitioner,

v.

UNITED STATES OF AMERICA  
and  
FEDERAL COMMUNICATIONS COMMISSION, Respondents,  
HUBBARD BROADCASTING, INC., Intervenor

No. 18,046

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,  
Appellant,

v.

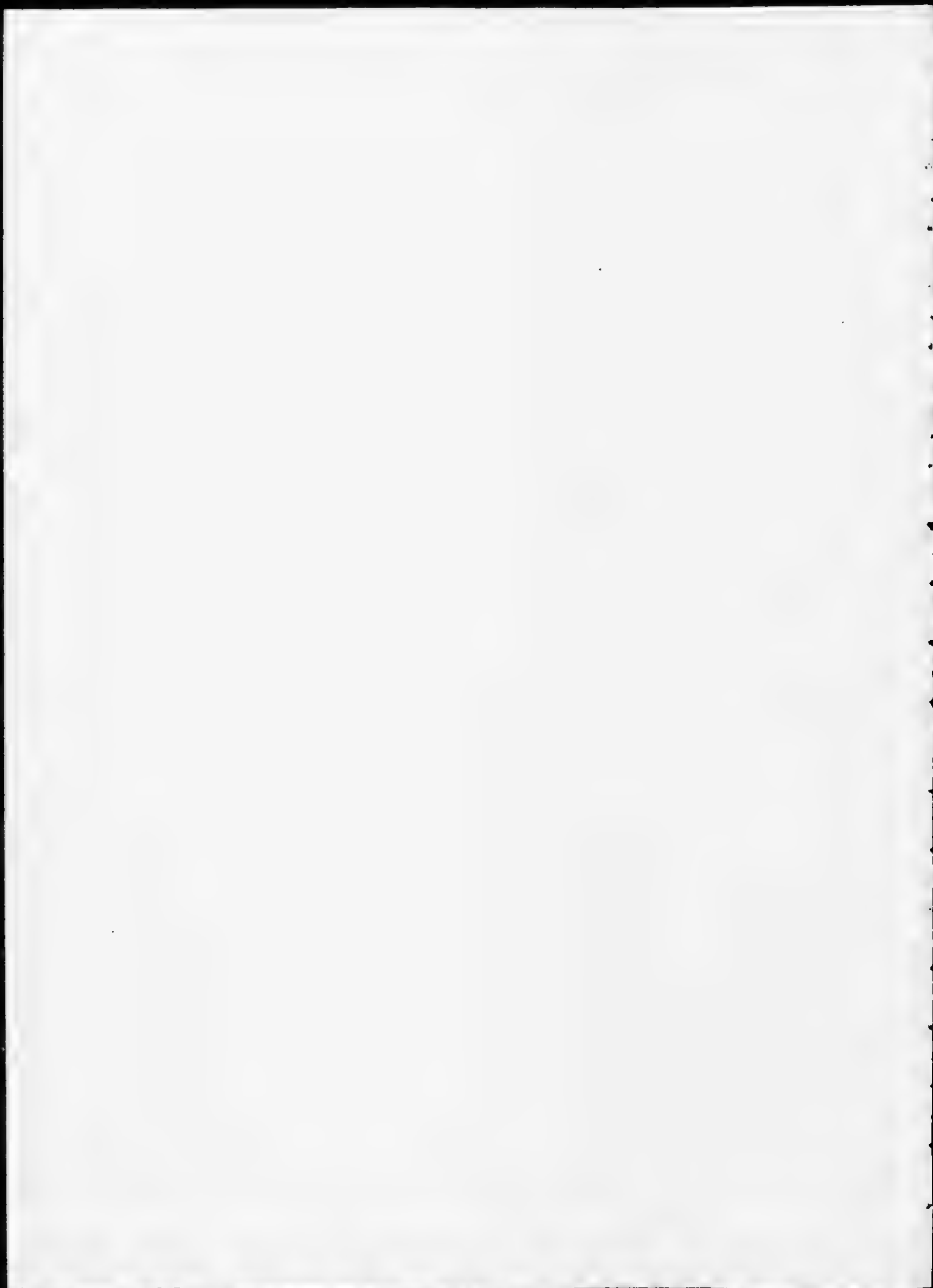
FEDERAL COMMUNICATIONS COMMISSION, Appellee,  
HUBBARD BROADCASTING, INC., Intervenor.

On Petition to Review and Appeal from Decisions and Orders of  
the Federal Communications Commission

Of Counsel:

SPEARMAN AND ROBERSON  
1023 Munsey Building  
Washington, D. C.

FRANK U. FLETCHER  
ROBERT L. HEALD  
EDWARD F. KENEHAN  
1023 Munsey Building  
Washington, D. C.  
Attorneys for  
Hubbard Broadcasting, Inc.





(i)

## COUNTERSTATEMENT OF QUESTIONS PRESENTED

Appellant-Petitioner in Case Numbers 17,567 and 18,046 proffers three questions for these appeals. Questions 1 and 2, which are not agreed to by Respondents or Intervenor are as follows:

1. Whether the actions here challenged, authorizing two unlimited time Class I operations on Class I-A Channel 770 kc, and to that end requiring the heretofore dominant station (WABC) to directionalize, thus curtailing by some 18 million the number of persons presently receiving primary and secondary coverage from the (flagship) station for the ABC radio network, taken by the Commission after it rejected in the Clear Channel Proceeding (because of resultant "substantial dislocations") any comparable dual directionalized Class I set-ups on any of the other 24 Class I-A channels, were arbitrary, unwarranted, illegal, violative of the public interest, and contrary to the decision and mandate of this Court in Case Nos. 15,399 and 15,400 (108 U.S. App. D.C. 83, 87-88).
2. Whether the disparate treatment accorded the ABC radio network and its New York flagship operation (in Docket 6584 and 6741) vis-a-vis that accorded its two major network competitors in Docket 6741, with ABC having indicated its willingness to accept in Docket 6584 a Class I and Class II-A breakdown of 770 kc comparable to that ordered for NBC's and CBS's New York flagship operations on 660 kc and 880 kc in order to end the KOB controversy, was arbitrary, illegal, prejudicial, violative of the public interest, and contrary to this Court's decision and mandate in Case Nos. 15,399 and 15,400 (108 U.S. App. D.C. 83, 87-88).

Question #3, which is agreed to by Respondents and Intervenor as a Question in Case No. 18,046 is as follows:

(ii)

3. Whether the Commission's rejection of proffered data designed to contrast the public interest gains by KOB in the west with the public interest losses by WABC and by the ABC radio network in the east, if WABC were required to directionalize and protect KOB, was erroneous.

Respondents proffer the following question for Case No. 17, 567:

Whether the Commission determined in Docket No. 6741 that the frequency 770 kc should be utilized by two Class I stations at night, and if so, whether the record in that proceeding, together with the Commission's 1958 decision in Docket No. 6584, support the determination.

Appellee and Intervenor proffer the following question for Case No.

18, 046:

Whether the Commission correctly decided in Docket No. 6584 on July 3, 1963 that ABC had not shown that, as a network, it would be prejudiced by the requirement that Station WABC, New York, operate directionally at night.

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# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 17,567

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AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,  
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v.

UNITED STATES OF AMERICA

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FEDERAL COMMUNICATIONS COMMISSION, Respondents,  
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No. 18,046

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AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,  
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FEDERAL COMMUNICATIONS COMMISSION, Appellee,  
HUBBARD BROADCASTING, INC., Intervenor.

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On Petition to Review and Appeal from Decisions and Orders  
of the Federal Communications Commission

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BRIEF FOR INTERVENOR

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COUNTERSTATEMENT OF THE CASE

Intervenor respectfully refers the Court to the statement of the

case it presents in Case Nos. 18,045 and 18,078 wherein it is the Appellant-Petitioner. Those cases have been consolidated with Case Nos. 17,567 and 18,046.

### STATUTE AND RULES INVOLVED

Pertinent provisions of the Communications Act of 1934, as amended, and of the Commission's Rules are set forth in Appendix A hereto.

### SUMMARY OF ARGUMENT

#### I

ABC has adopted a self-serving and completely unwarranted interpretation of this Court's 1960 Decision, hoping that it can continue to operate Station WABC in New York City non-directionally on the frequency 770 kilocycles in spite of the Commission's September 3, 1958 Decision, which concluded that the public interest, convenience, and necessity requires that a station operating on the frequency 770 kilocycles in New York City be directionalized to permit Station KOB to also operate on that frequency in Albuquerque, New Mexico. ABC recognizes that the Commission's 1958 Decision, as affirmed by this Court in 1960, amended Section 3.25 of the Commission's Rules to accommodate two stations on 770 kilocycles, but contends that the amendment was conditional on the subsequent breakdown of the frequen-



cies 660 kilocycles and 880 kilocycles as a result of the clear channel proceeding then pending before the Commission. The fact is, however, that neither the Commission's Decision nor the affirming opinion of this Court were conditional in any respect. The Court merely suggested in its opinion that if ABC suffered an inequity vis-a-vis the NBC and CBS radio networks because of the breakdown of the frequency 770 kilocycles, ABC could seek relief in some other appropriate proceeding, i. e. , by applying for the New York facilities of NBC or CBS at renewal time or by pressing its claim in the then pending clear channel proceeding (Docket No. 6741). Instead of so proceeding, ABC has elected to try to convince the Commission and this Court, using the caveat in this Court's 1960 opinion as an excuse, that the entire KOB-WABC controversy and the clear channel proceeding should be retried. The obvious objective of this tactic is to insure for itself a license in perpetuity for the operation of a non-directional broadcast station on 770 kilocycles in New York City. Not only is this objective solely a private and selfish one, but ABC's efforts to accomplish it flaunts, frustrates, and defeats the public interest objectives of the Commission's September 3, 1958, Decision and this Court's 1960 opinion affirming that Decision.

## II

Insofar as the Commission's July 8, 1963, Decision concludes

and holds that ABC as a radio network will not be adversely affected competitively vis-a-vis the NBC and CBS radio networks, it is correct and satisfies the caveat to this Court's 1960 opinion. The record of the hearing on which the Commission based its July 8, 1963, conclusion that ABC would not be adversely affected as a network if it operated WABC directionally is virtually void of evidence even suggesting such an adverse effect and, in fact, tends to show that the ABC network would not be adversely affected in any respect. Thus ABC has completely failed to show that any inequity will exist within the meaning of this Court's opinion of May 27, 1960, and its appeal should be denied.

#### ARGUMENT

As the Appellant-Petitioner in Case Nos. 18,045 and 18,078, Intervenor, Hubbard Broadcasting, Inc., explained in its brief how it is injured by the Commission's Decision of July 8, 1963, and set forth its reasons why the Decision should be reversed in those particulars. Basically, it is Hubbard's position that the Commission erred in not ordering, unconditionally and without regard to any applications to be filed in the future, that the WABC renewal application (File No. BR-167) be DENIED. Had this been the Commission's decision, Hubbard's pending and unacted-upon application for a construction permit for a new station to operate on 770 kilocycles in New

York City could have been granted without a hearing. While this would not have relieved Hubbard from the past injury it suffered because its New York City application was not designated for hearing in the consolidated proceeding here involved, it would have relieved Hubbard of the injury it is now and will continue to suffer because of the procedure contemplated by the July 8, 1963, Decision, namely, that at some time in the future Hubbard's New York City application will be designated for hearing with a modification of facilities application yet to be filed by ABC but not with the WABC renewal application.

ABC, as the Appellant-Petitioner in Case Nos. 17,567 and 18,046, contends, in effect, that the Commission erred in not granting the WABC renewal application unconditionally. Affirmatively, ABC requests this Court to direct the Commission either to grant KOB, Intervenor's Albuquerque, New Mexico, station, Class II-A rights on 770 kilocycles rather than the Class I rights KOB has applied for (and the only rights it can apply for under the Commission's Rules) or to place KOB on some other channel. Assuming these actions are legally possible at this time, which they are not, the end result would be grant of the pending WABC renewal application, and it would seem that even ABC would concede that this is not possible so long as Hubbard's New York City application retains its mutually exclusive status vis-a-vis the renewal. Surely everyone

involved in this proceeding must admit that the Ashbacker doctrine [Ashbacker v. Federal Communications Commission, 326 U.S. 327, 90 L. Ed. 108 (1945)] forecloses any such possibility.

How the Commission could grant KOB a Class II-A facility or place that station on some other frequency--even if the Court's 1960 Decision were the mandate ABC says it is--is also a mystery. Section 308(a) of the Communications Act of 1934, as amended, provides that: "The Commission may grant construction permits and station licenses . . . only upon written application therefor received by it. . ." and the simple fact of the matter is that the Commission has received no application either for a Class II-A facility for KOB or for any frequency other than 770 kilocycles. Furthermore, it has received no request for amendment of Section 3.25 of its Rules which must be changed before anything other than a Class I facility can be applied for on 770 kilocycles.

On the other hand, the Commission has received and has pending before it Hubbard's application for 770 kilocycles in New York City. This application does comply with the Commission's Rules in all respects and, if granted instead of the WABC renewal, the result will be complete compliance with the public interest objectives of the September 3, 1958, Decision which was affirmed by this Court's 1960 opinion (American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission, 108 U.S.

App. D. C. 83, 280 F. 2d 631). In the latter, the Court stated as follows (108 U.S. App. D. C. at 87, 280 F. 2d at 635):

" . . . In its decision of September 3, 1958, the Commission has in effect ruled that even if network competition would be adversely affected, it would not be in the public interest to delay further the rule change necessary to permit KOB to operate as a Class I station. Summarizing its findings of fact and conclusions, the Commission stated that 'it is apparent . . . that only if KOB is restored to the status of a Class I-B station would it be enabled to provide a broadcast service even nearly adequate to fulfill the needs of the comparatively greatly underserved populations in the Southwest.' The finding of engineering availability and local need was based on substantial evidence. It appears to us to be in furtherance of the policy of 47 U.S.C.A. Section 307 (b) that 'In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair and equitable distribution of radio service to each of the same.' "

How in the face of this strong and unequivocal language ABC can say that this Court in 1960 mandated the Commission to grant KOB II-A facilities on 770 kilocycles or some other frequency is beyond all powers of comprehension. Such a contention tries one's patience, particularly in a proceeding such as this which has already been in progress for well over twenty years and, unless this Court decisively mandates the Commission to promptly process the applications now before it in accordance with the Communications Act, gives promise of going on for another twenty years.

The Court Did Not Mandate The Commission To Change Its  
1958 Decision If It Subsequently Gave Full Use Of Clear  
Channels To CBS and NBC

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While the Court itself is best qualified to say what it did and did not decide in 1960, it is respectfully submitted that the next to last paragraph of the 1960 opinion (American Broadcasting-Paramount Theatres, Inc. *supra* at 87-88, 280 F. 2d at 635-636) cannot be construed to mean that the Commission was required to reopen the record on which it based its 1958 Decision, retry the same issues, and come to an opposite conclusion if it subsequently decided in the clear channel proceeding (Docket No. 6741) that the frequencies 660 kilocycles and 880 kilocycles were not to be broken down in the same manner as 770 kilocycles was broken down to accommodate KOB.

This Court did say that the Commission should "seek to provide channel facilities to the ABC network on a basis which is fair and equitable in comparison with other networks," but it did not say that the Commission should seek to do so by holding further hearings in the instant proceeding. Had the Court so ordered, it would have been tantamount to ordering the Commission to proceed contrary to the objectives of the Rule amendment it was affirming <sup>1/</sup> and con-

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<sup>1/</sup> The Court affirmed the Commission's Decision to amend Section 3.25 of the Rules so as to permit two directionalized stations, one in New York City and the other in Albuquerque, New Mexico, to operate on the frequency 770 kilocycles. If this affirmation was conditional in the sense ABC now says it was, the Court undoubtedly would have spelled out the condition in its ordering clause.



trary to the requirements of the Communications Act. <sup>2/</sup>

What the Court told the Commission in its 1960 opinion, after affirming the Commission's decision to amend Section 3.25 of its Rules, was that the Commission should adjust any inequity resulting to ABC as a network--if in fact such inequity existed--in some other appropriate proceeding. The Court indicated that the Commission might sua sponte afford "some other procedural remedy" (Underscoring supplied), but the cogent and realistic suggestion the Court made was that, if ABC believed that sharing 770 kilocycles was prejudicial to it vis-a-vis the other networks, it (ABC) should take matters into its own hands "by filing competitive applications when present licen-

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<sup>2/</sup> With the amendment of Section 3.25 of the Rules affirmed by this Court in 1960, the normal licensing procedures prescribed by Congress took over. As Hubbard (then Albuquerque Broadcasting Company) pointed out in its brief in Case Nos. 15,399 and 15,400, the procedural remedy to effectuate the Commission's 1958 Decision was at hand when the Court rendered its 1960 opinion. The WABC renewal application had been filed, the required amendment to the KOB application had been filed, and intervenor (then KSTP, Inc.) had filed an application for ABC's New York facilities, the latter specifying an operation compatible with the KOB Albuquerque proposal. With these mutually exclusive applications on file, all complying with the rules, the Commission's responsibility and duty under the Communications Act was clear. Pursuant to the then Section 309(b) of the Act, it could only designate the three applications for hearing in a consolidated proceeding to determine whether ABC's renewal application or intervenor's two applications (one to modify the facilities of KOB and the other for a compatible directional operation in New York City) should be granted. Being aware of this legal requirement, this Court would hardly tell the Commission to proceed in disregard of it, and yet that is precisely what ABC is saying the Court did.

sees on other frequencies seek renewal . . . "

"Thus," said the Court, "We do not believe that ABC has been or should be precluded from a hearing on its claim that the public interest requires that the loss of service in the East, which Class I broadcasting from Albuquerque produces, be absorbed by some Eastern broadcaster other than WABC. . . Any failure by the Commission to give due consideration to ABC's claims for treatment comparable to other networks, when raised in an appropriate manner, may be brought to the courts for review." American Broadcasting-Paramount Theatres, Inc., supra at 88, 280 F. 2d at 636. (Underscoring supplied.)

ABC, however, refuses to follow this suggestion. Rather, it has adopted and elects to follow a completely unwarranted course of action, based on an illogical and self-serving interpretation of the caveat to this Court's 1960 opinion. The effect of the course of action ABC is pursuing is to frustrate and block the implementation of the Commission's 1958 public interest determination with a view to insuring for ABC a license to operate a station in New York City in perpetuity. Whether unwittingly or not, the Commission, by refusing to designate Hubbard's New York City application for hearing with the WABC renewal application, is aiding and abetting these efforts, and the efforts will be successful unless this Court orders the Commission to proceed according to the Congressional mandate.

This Court did not conclude in its 1960 opinion "that ABC should not be required to share a channel if other networks were given full use of their channels." <sup>3/</sup> Rather, the Court unconditionally affirmed the Commission's decision and as a result WABC was required either to share the frequency 770 kilocycles with KOB or to turn in its license. The Court then suggested other avenues of relief for ABC, none of which ABC has pursued. Prior to June 1, 1963, <sup>4/</sup> ABC could have competed for the WNBC (NBC) or WCBS (CBS) frequencies by filing an application therefor when those stations sought renewal, but it chose not to do so. Instead it elected to follow a procedure designed to forestall a final resolution of the

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<sup>3/</sup> See footnote 2 (page 23) of ABC's brief. At page 22 of its brief ABC states as follows:

"If we read this Court's 1960 decision aright, the Commission was explicitly told that 'the position of ABC as a network should not be permanently prejudiced by forcing it to share a channel [in Docket No. 6584] if other networks are [subsequently] given full use of clear channels [in Docket No. 6741].' The Commission was further told that it should, in the clear channel proceeding, sua sponte, or otherwise, 'seek to provide channel facilities to the ABC network on a basis which is fair and equitable in comparison with other networks.'"

Perhaps the kindest remark in response to the foregoing statement is that ABC does not "read this Court's 1960 decision aright."

<sup>4/</sup> New York license terms expired June 1, 1963, pursuant to Section 3.34(a)(18) of the Commission's Rules.

instant proceeding, and to date it has been successful.

To excuse or justify the course it has elected to pursue, ABC now says that the Commission arrived at its 1958 Decision, and this Court affirmed that Decision, only with the understanding that the frequencies 660 kilocycles and 880 kilocycles would be broken down in the clear channel proceeding. In response to this contention, it need only be pointed out that neither the clear channel proceeding nor the broad general issues involved in that proceeding had anything to do with the Commission's 1958 Decision to break down the frequency 770 kilocycles and to amend Section 3.25 of the Rules. Furthermore, the clear channel proceeding had no bearing on this Court's affirmation of the 1958 Decision. In this regard, the Commission's Decision and this Court's Opinion speak for themselves. No purpose would be served by further arguing the validity of the first two questions which Petitioner-Appellant ABC contends are pertinent to these appeals. The two questions (1 and 2) and eight of ABC's points of error set forth in its brief (1, 2, 3, 4, 5, 6, 8, and 10) present the same contentions and arguments made by ABC, and rejected by the Court, in Case Nos. 15,399 and 15,400. ABC is again questioning actions taken by the Commission in the clear channel proceeding and is, in effect, asking the Court to direct the Commission to retry that proceeding. There is no merit whatsoever to this position.

## II

The Commission Correctly Decided That ABC Had  
Not Shown That The ABC Network Would Be  
Prejudiced If WABC Operated Directionally At Night

The Commission's September 3, 1958, action amending Section 3.25 of its Rules to accommodate two Class I stations on 770 kilocycles was not in any respect contingent or interlocutory. It was a final action, finally and unequivocally affirmed by this Court in 1960. There was no need, therefore, for the Commission to hold the type of hearing that resulted in the July 8, 1963, Decision now before the Court for review in the instant cases. In fact, without Hubbard's New York City application included in the hearing, it was meaningless except insofar as it gave ABC an opportunity to show network inequity resulting from the breakdown of 770 kilocycles. The injury resulting from the hearing, however, was suffered by Hubbard, not by ABC.

What prompted the Court to include a caveat in its 1960 Opinion was ABC's claim that a breakdown of 770 kilocycles would prejudice ABC competitively. Thus the Court pointed out that the difficult question it faced in arriving at its 1960 decision (but which it resolved against ABC) was ABC's "claim that to divide 770 kc with KOB would seriously affect the operations of WABC, the ABC network's 'flag-ship' station, and would thus place the ABC network at a competitive disadvantage vis-a-vis the other two large networks, National Broadcasting and Columbia Broadcasting." (American Broadcasting-Para-

mount Theatres, Inc., supra at 86, 280 F. 2d at 634.)

Because it was concerned that ABC might suffer competitive disadvantage in this regard as a result of its (the Court's) affirmation of the breakdown, the Court suggested in its caveat that such an inequity, " . . . if it exists or is permitted to exist, should be cognizable by the Commission in a proper proceeding brought before it by ABC, even though the assignment of KOB to 770 kc is permitted to continue." American Broadcasting-Paramount Theatres, Inc., supra at 87, 280 F. 2d at 635. (Underscoring supplied.) While ABC never moved to institute a proper proceeding, it was given (at the expense of Hubbard, who had applied for 770 kilocycles in New York City for the license period June 1, 1960 - June 1, 1963) an opportunity, in the proceeding now before the Court, to establish whether an "inequity" did or would exist. There is no error in the Commission's July 8, 1963, Decision insofar as this facet of the matter is concerned.

The simple fact of the matter is that ABC not only wholly and completely failed to meet its burden of establishing that it would be placed at a disadvantage competitively vis-a-vis NBC and CBS as a result of this Court's affirmation of the 770 kilocycle breakdown, but it, in effect, refused to attempt to meet that burden. Appropos are the following comments in the Broadcast Bureau's "Reply to 'Proposed Findings of Fact and Conclusions of Law of American Broadcasting-Paramount Theatres, Inc.' " (R. 629-632):



"1. Some comment with respect to the Proposed Findings and Conclusions filed by American Broadcasting-Paramount Theatres, Inc. ("ABC") on March 19, 1962, is appropriate. ABC has apparently forgotten that in its order designating the additional hearing in this proceeding, the Commission made it clear that its only purpose was to consider:

'... any additional evidence to be presented by WABC with respect to its network position on the frequency 770 kilocycles and to determine in the light of such evidence whether the issue is such that it overrides the 307(b) determination previously rendered by the Commission in its decision of September 3, 1958.' (Order released August 4, 1961; Mimeo FCC 61-981.)

"2. ABC needs to be reminded that the Commission in its decision of September 3, 1958 (25 FCC 683) fully considered the extent of the loss of secondary service which would accrue to Station WABC if it were to directionalize. Also fully considered in that same decision were the consequent effects upon the public of the implementation of that determination. ABC needs also to be reminded that the Court of Appeals fully sustained the Commission's findings and conclusions in these respects, leaving open only the question of possible adverse affect upon the ABC network - an issue raised by ABC.

"3. In its proposed findings in this proceeding ABC has sought to obfuscate the undeniable fact that the argument that its network position would be adversely affected if the Commission's decision of September 3, 1958, were to be implemented is not supported by any valid evidence in the record of this proceeding. ABC's long and detailed exposition of the history of this proceeding, whatever the accuracy of the ABC version, is already well documented in the records of the Federal Communications Commission and the Court of Appeals. It was not the purpose of this proceeding to retrace that well worn path. It was the purpose of this proceeding - the only purpose as the Commission made it so clear - to give ABC the opportunity to support with evidence its argument that requiring WABC to directionalize would have an adverse effect upon the ABC network. This ABC clearly has not done. ABC's proposed findings, as does the entire

evidentiary record in this hearing, stand as eloquent testimony to the one undeniable fact that it cannot be demonstrated that any cognizable adverse effect will accrue to the ABC network if Station WABC were to directionalize.

"4. A few examples will suffice. ABC asks that the Examiner find on the testimony of its programming Vice President that the ABC network is operating at a loss. This testimony, clearly incompetent, was stricken from the record by the Examiner (Tr. 346). Counsel for ABC asked for and was given an opportunity to produce competent evidence as to the network's financial position (Tr. 283). He decided not to do so (Tr. 330). ABC seeks findings as to the importance of secondary coverage to network time sales. ABC disregards the testimony of its sales Vice President that as a time salesman he was not even conversant with secondary coverage. He was briefed on the subject for his appearance in this proceeding (Tr. 318). ABC seeks findings to the effect that its network has a weakness due to the lack of extensive secondary coverage. It ignores the testimony of its own witness and its own literature showing that the ABC network excels in primary coverage and that secondary coverage is of no benefit to advertisers (KSTP Exs. 1 and 2). The testimony of ABC's witnesses in this regard was wholly speculation and hearsay as to what others might think or say (Tr. 297-300).

"5. ABC sought throughout the hearing to substitute argument for evidence. It has carried this process into its proposed findings. All that ABC has proved is that its argument regarding adverse effect upon its network position is wholly without evidentiary foundation. This contention, wholly lacking in evidentiary support, should not and cannot be permitted to delay any longer implementation of the determination reached by the Commission almost four years ago. The findings and conclusions proposed by ABC are either irrelevant to this proceeding or wholly without foundation in the record. The Examiner should adopt the findings and conclusions proposed by the Broadcast Bureau. Public interest and orderly process require that implementation of the Commission's decision of September 3, 1958, be accomplished without further delay."

The foregoing comments are selective, but they accurately depict the current sad chapter of the KOB-WABC story which, if ABC is permitted to continue writing the script, should be entitled, "1941 to Eternity." There are other examples of ABC's failure to meet its burden in this proceeding, examples which actually tend to prove that ABC will not be at all adversely affected as a network if WABC is required to operate directionally. For instance, ABC network officials, including its Vice President in charge of sales, admitted that prior to the hearing they were not aware of WABC's skywave coverage (R. Tr. 318, 319); admitted that to a great degree the basic pattern of modern radio network time sales is to sell daytime exposure on the network and simply tie in nighttime sales (R. Tr. 323); acknowledged that the ABC radio network claims coverage of 95% of the nighttime radio homes in the continental United States (KSTP Ex. 1, R. 38-80; R. Tr. 273, 305); acknowledged that the ABC radio sales presentation primarily stresses "inside" coverage by their affiliates (KSTP Exs. 1 and 2, R. 38-81); and admitted that the ABC radio network has more affiliates overall, and also more affiliates in the top 200 markets, than either of the NBC or CBS radio networks (R. Tr. 235, 306).

Hubbard submits, and is certain the Court will agree, that the Commission correctly concluded that the record on which it based its July 8, 1963, Decision presented a "virtual void" on the question

of whether the ability of the ABC radio network to compete with other radio networks would be adversely affected if WABC were required to directionalize (R. 506). As the Commission went on to say (R. 507): "It may be conceded that the Commission's requirement that WABC directionalize nighttime while WCBS and WNBC are permitted to operate non-directionally would leave ABC with a facility in New York inferior, from the standpoint of coverage, to those of NBC and CBS. ABC, however, has failed to translate the comparatively inferior coverage of WABC into a competitive inferiority of the ABC radio network vis-a-vis NBC and CBS."

While Hubbard's position is that the Commission should have, and was legally required to, make this determination in another more appropriate type of proceeding as the Court suggested, the fact that the Commission has made the correct determination--and has adequately satisfied the caveat in this Court's 1960 opinion--cannot be questioned.

### III

#### Other Claims Made By ABC Are Unsubstantial And Immaterial

In its brief, ABC sets forth only two points (7 and 9) that do not, by specific reference, rely on the assumption that the Commission in the proceeding here on review should have taken into account the clear channel proceeding and its actions in that proceeding. The impropriety of considering such matters has been dis-

cussed above.

ABC's seventh point is that the Commission erred in rejecting proffered data designed to contrast the minimal public interest gains by KOB in the West with the substantial public interest losses by WABC and the ABC radio network in the East. This, of course, was the basic consideration involved in the proceeding that led to the Commission's decision of September 3, 1958. It is the basis of the Commission's 1958 conclusion, as affirmed by this Court, that Section 307(b) of the Act requires the breakdown of 770 kilocycles. The ruling was against ABC, and the ruling cannot be collaterally attacked in this proceeding.

ABC's ninth point, i. e., that the Commission's rulings on ABC's exceptions to the Initial Decision, to the extent rejected, were erroneous, is also based on the unwarranted assumption that ABC in the proceeding here on review was entitled to retry not only the issues decided by the Commission in its 1958 Decision but the entire clear channel proceeding as well. The Commission correctly ruled on ABC's exceptions in view of the limited scope of the sole issue involved in the hearing.

#### CONCLUSION

For the foregoing reasons, the July 8, 1963, Decision of the Commission should be affirmed insofar as it holds that any AM broadcast station that operates in New York City on the frequency 770

kilocycles must employ a directional antenna with the parameters specified in Paragraph 22 of the Findings of Fact of the Commission's Decision of September 3, 1958.

Respectfully submitted,

FRANK U. FLETCHER

ROBERT L. HEALD

EDWARD F. KENEHAN

Attorneys for  
Hubbard Broadcasting, Inc.

Of Counsel:

SPEARMAN AND ROBERSON

1023 Munsey Building  
Washington, D. C.

December 24, 1963



## APPENDIX A

## STATUTE

Communications Act of 1934, as amended  
47 U.S.C. 151 et seq:

Sec. 308. (a) The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it: Provided, That (1) in cases of emergency found by the Commission involving danger to life or property or due to damage to equipment, or (2) during a national emergency proclaimed by the President or declared by the Congress and during the continuance of any war in which the United States is engaged and when such action is necessary for the national defense or security or otherwise in furtherance of the war effort, or (3) in cases of emergency where the Commission finds, in the nonbroadcast services, that it would not be feasible to secure renewal applications from existing licenses or otherwise to follow normal licensing procedure, the Commission may grant construction permits and station licenses, or modifications or renewals thereof, during the emergency so found by the Commission or during the continuance of any such national emergency or war, in such manner and upon such terms and conditions as the Commission shall by regulation prescribe, and without the filing of a formal application, but no authorization so granted shall continue in effect beyond the period of emergency or war requiring it: Provided further, That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

## FEDERAL COMMUNICATIONS COMMISSION RULES

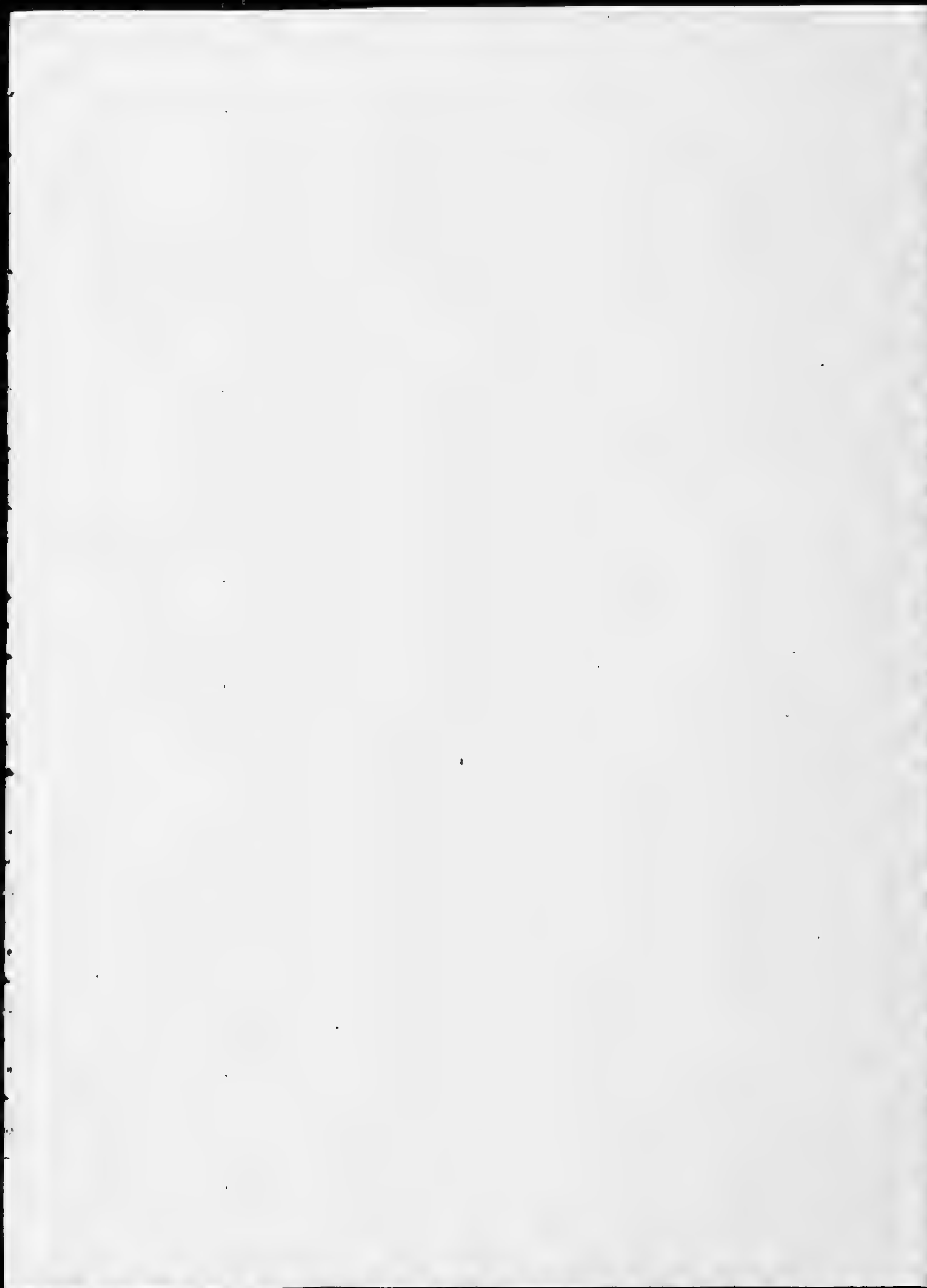
## §3.34 Normal license period

(a) Licenses for standard broadcast stations ordinarily will be issued for a period of three years and, when regularly

renewed, at three year intervals thereafter: Provided, however, That, if the Commission finds that the public interest, convenience and necessity will be served thereby, it may issue either an initial license or a renewal thereof for a lesser term. When regularly issued or renewed, licenses will be issued to expire at the hour of 3:00 a. m., eastern standard time, in accordance with the following schedule, and at three year intervals thereafter.

\* \* \*

(18) For stations located in New Jersey and New York, June 1, 1957.



REPLY BRIEF FOR APPELLANT-PETITIONER IN  
NUMBERS 18,045 and 18,078  
IN THE

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**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Nos. 17,567 and 18,046

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AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,  
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA

and

FEDERAL COMMUNICATIONS COMMISSION,  
Respondents-Appellee,

HUBBARD BROADCASTING, INC.,  
Intervenor.

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Nos. 18,045 and 18,078

---

HUBBARD BROADCASTING, INC.,  
Appellant-Petitioner,

v

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA,  
Appellee-Respondents,

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,  
Intervenor.

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Appeal from and Petition for Review of a Decision  
of the Federal Communications Commission

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Of Counsel:  
SPEARMAN AND ROBERSON  
1023 Munsey Building  
Washington, D. C.

FRANK U. FLETCHER  
ROBERT L. HEALD  
EDWARD F. KENEHAN  
1023 Munsey Building  
Washington, D. C.  
Attorneys for  
Hubbard Broadcasting, Inc.

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- III. This Is Not An Unusual Or Exceptional Type Of Proceeding Requiring Extraordinary Action.
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IN THE  
**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Nos. 17, 567 and 18, 046

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AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,  
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA  
and  
FEDERAL COMMUNICATIONS COMMISSION,  
Respondents-Appellee,

HUBBARD BROADCASTING, INC.,  
Intervenor.

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Nos. 18, 045 and 18, 078

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HUBBARD BROADCASTING, INC.,  
Appellant-Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION  
and  
UNITED STATES OF AMERICA,  
Appellee-Respondents,

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,  
Intervenor.

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Appeal from and Petition for Review of a Decision  
of the Federal Communications Commission

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REPLY BRIEF FOR APPELLANT-PETITIONER IN  
NUMBERS 18, 045 and 18, 078



Preliminary Statement <sup>1/</sup>

The principal contention of Appellant-Petitioner, Hubbard Broadcasting, Inc., is that the Commission's July 8, 1963, Decision grants Station WABC's renewal application and, therefore, unlawfully denies Hubbard's mutually exclusive and co-pending application for 770 kilocycles in New York City (File No. BP-13932) within the meaning of Ashbacker v. Federal Communications Commission, 326 U.S. 327, 90 L. Ed. 108 (1945). The Appellee, the Respondents, and the Intervenor contend and argue that the July 8, 1963, action did not grant the WABC renewal and therefore results in no injury to Hubbard.

In this connection, the Commission has ordered "... that the application of American Broadcasting-Paramount Theatres, Inc., is denied, without prejudice to reconsideration if ABC files, within 30 days of the release date hereof, an application for modification of facilities on the frequency 770 kc in conformity with the parameters specified in paragraph 22 of the September 1958 decision herein (25 FCC 683, 16 RR 765)."

This, it is submitted, is in legal and practical effect, no

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<sup>1/</sup> Additional relevant provisions of the Communications Act of 1934, as amended, relied on are printed in Appendix A to this reply brief.

different than ordering that the application for renewal of license of Station WABC is granted subject to the condition that ABC files within 30 days, etc., an application for modification of facilities on the frequency 770 kc. Thus exposed, the action, in view of Ash-backer, clearly constitutes a denial of Hubbard's mutually exclusive application for 770 kc in New York City. As Hubbard explained in its Brief, no other result could obtain in view of the requirements of Section 307(d) of the Communications Act. Before an application for modification of facilities (more accurately an application for construction permit authorizing a change of facilities) can be properly considered at this juncture the Commission must grant the WABC renewal application and as of July 8, 1963, it could not grant that application without also denying Hubbard's New York application. Section 307(d) of the Act simply will not permit any other method of disposition regardless of the semantics used to disguise the action.

It is not surprising, therefore, that both the Intervenor and Appellee-Respondents have aimed their arguments "off-target". ABC contends, on the one hand, that the action is not reviewable, and that Hubbard complains only because WABC has been permitted to remain on the air pending these appeals. Appellee-Respondents contend, on the other hand, that the Commission's action does no

more than permit ABC to amend its renewal application. On making the latter argument Appellee-Respondents are saying, in effect, that the Commission has taken no action with respect to the WABC renewal application.<sup>2/</sup>

# I.

## Hubbard Is Not Concerned With The Continued Operation Of Station WABC Pending The Outcome Of These Appeals

ABC would have it appear that Hubbard is appealing to this Court because WABC has been permitted to remain on the air pending the outcome of these appellate proceedings. This, of course, is simply another smoke-screen. Hubbard is well aware of ABC's appellate rights and it is not concerned that WABC continues on the air while those rights are being adjudicated. Hubbard is concerned, however, about the continued operation of WABC after this Court has ruled on the questions now before it and, regardless of how the Court rules on WABC's appeals (Case Nos. 17, 567 and 18, 046) - whether it affirms

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<sup>2/</sup> Inconsistently, however, Appellee-Respondents' brief at page 31 speaks in terms of "reconsideration of the denial" and says "... the sole consequence here would be reinstatement of ABC's renewal application...". As will be further explained, it is more than apparent that Appellee-Respondents are either hopelessly confused or recognize the validity of Hubbard's position and are attempting to avoid the consequences at any cost. In any event, as the Court will surely recognize, reconsideration of an action is one thing and reinstatement of an application is something entirely different. One or the other might be in order in a given case but not both.

or reverses the Commission - WABC will continue to operate and the rights of Hubbard, which derive from its pending New York City application, will continue to be violated.<sup>3/</sup>

Thus, assuming that this Court could and does grant the relief requested by ABC, the WABC renewal application would continue in a pending status and WABC would continue to operate pursuant to the "hold over" authority extended by Section 307(d) of the Act. On the other hand, if this Court should affirm the Commission's decision of July 8, 1963, ABC would be permitted to file an application for construction permit, resulting in Commission reconsideration of the so-called denial action, outright grant of the WABC renewal application, and continued operation of Station WABC pursuant to a regular license. The injury to Hubbard in either event is more than

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<sup>3/</sup> ABC's brief for the most part is in support of its August 29, 1963, motions to dismiss these cases (Nos. 18,045 and 18,078) but the jurisdictional questions raised by those motions has already been argued in the responsive pleadings. On September 27, 1963, the Court ordered that the Motions would be held in abeyance pending the hearing of these cases on their merits. It should be pointed out, however, that the cases now pending before the Court differ substantially from Case Nos. 16,577 and 16,578 which were dismissed by the Court on January 15, 1962. At the time the latter were dismissed the Commission had taken no action on the WABC renewal and it was possible, as the Commission then argued, that that application would be properly denied - thus removing all obstacles to a grant without hearing of Hubbard's New York application. Now, however, the Commission has granted the WABC renewal and Hubbard's injury is total and complete.

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obvious and it is this injury, i. e., that resulting from the authorization of WABC operation following this Court's ruling, that has prompted Hubbard's appeal -- not the injury resulting from the continued operation of WABC pending the Court's ruling.

## II.

### Modification Of The WABC Facilities Cannot Be Accomplished By Amending The WABC Renewal Application.

Appellee-Respondents' answer to Hubbard's contention is even more superficial. Not only do they fail completely to advance an argument opposing Hubbard's claim that an application for modification of the WABC facilities cannot be considered prior to favorable action on the WABC renewal application but they also refuse to recognize that a modification application is involved. What is involved, they say, is a simple amendment of the WABC renewal application, "the requirement that ABC file an application for modification of facilities..." being "... merely a technique for accomplishing..." such an amendment.

The difficulty with this "technique", however, is that it is completely at variance with, and is prohibited by, Section 319(a) of the Communications Act which provides in part that:

No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission.

That this provision of the Act applies to the construction that would be necessary to accomplish the modification of WABC's facilities as contemplated by the Commission's September 1958 Decision, is elementary. At the very least, ABC must construct an entirely new transmission facility employing two towers for nighttime operation instead of the one tower presently authorized, a new ground system, and directional antenna phasing equipment. In view of the requirements of Section 319 of the Act such a facility cannot be licensed before it is constructed and it cannot be constructed until after construction is authorized by a construction permit issued by the Commission following action pursuant to Section 309 of the Act on an application for the construction permit (FCC Form 301).

When a timely filed application for a construction permit looking toward modification of an existing station's facilities is granted, Section 319(c) of the Act then requires that the new facilities be licensed and this the Commission accomplishes by action on an Application For New Broadcast Station License (FCC Form 302). In such a case the instrument of authorization that issues is a Standard Broadcast Station License (FCC Form 352), the same instrument used to initially license standard broadcast stations except that it usually refers to the date of modification.

The Communications Act clearly distinguishes a construction permit from a license, the former being "that instrument of authorization required...for the construction of a station, or the installation of apparatus, for the transmission of energy, or communications, or signals by radio..." and the latter being "...that instrument of authorization required...for the use or operation" of such apparatus "...by whatever name the instrument may be designated by the Commission" (see Section 3(bb) and (dd) of the Act reproduced in Appendix A hereto).

A broadcast license, therefore, whether as initially issued, as modified, or as renewed can only authorize the use or operation of facilities.<sup>4/</sup> It does not, and cannot be disguised so as to, authorize construction of the facilities to be used or operated. The latter authority must result from a "construction permit" issued pursuant to Section 319 of the Act and unless a construction permit is first obtained pursuant to that section the license authorization

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<sup>4/</sup> Attached as Appendix B to this brief is a copy of the WABC license ABC has requested be renewed in the renewal application involved in these cases. The renewal application itself (FCC Form 303) is a part of the record before the Court (R. 861-905). Neither of these forms contemplate anything more than that facilities previously authorized be relicensed. What is applied for and what the Commission must issue in response to the application is an authorization to use and operate apparatus.

may not be issued. It follows, therefore, that modification of the WABC facilities as suggested by the Commission's July 8, 1963, Order cannot be accomplished by an amendment to, and action on, the WABC renewal application, either as initially filed or as amended.

By statutory definition the authorization issued a station following grant of a renewal application is itself a license and does not and cannot authorize construction. As explained above, the steps that must be taken to modify the WABC license are clearly specified by statute. What is required is an application for a construction permit, favorable action on that application, construction pursuant to the authority granted, and finally the issuance of a modified license authorizing operation. For the reasons set forth in Hubbard's initial brief, however, this course of action is now legally possible for Station WABC only if the Commission's action of July 8, 1963, has, as Hubbard contends it has, granted the WABC renewal application.

Obviously, the July 8, 1963, action was a grant of the WABC renewal application and as such constituted an unlawful denial of Hubbard's New York application without a hearing.

### III.

This Is Not An Unusual Or Exceptional Type Of  
Proceeding Requiring Extraordinary Action

Not only do the principal arguments advanced by Appellee-Respondents and Intervenor in their briefs lack merit but there is even less merit to their pleas that in this case "exceptional measures are particularly appropriate because of the background and special nature of this long continuing controversy as to the proper use of the frequency 770 kc." (Appellee-Respondents' Brief 33).

Even if this proceeding was as exceptional as the Commission and ABC would have it appear, the actions already taken and those contemplated by the Commission could not be supported. No case is so exceptional as to warrant the disregard of statutory requirements to the extent such requirements must be disregarded, ignored, and, in fact, destroyed, in order to achieve the result now proposed by the Commission in this case. In spite of its own admission that Hubbard's New York application is mutually exclusive with the WABC renewal application (letter dated August 22, 1960; R. 1030, 1031) the Commission has continuously to the present time refused to designate Hubbard's application for hearing in total disregard of the duties and responsibilities imposed on it by Section 309 of the Communications Act. Also disregarded and effectively read out of the Act, are the provisions of Section 307(d) limiting broadcast license terms to no more than three years and extending

licenses beyond their regular three year terms only for the purpose of reaching a final decision on an application for renewal of the license for another term. Finally, Appellee-Respondents would permit ABC to amend its renewal application even though such a procedure could only result in a license the issuance of which under the circumstances of this case is expressly forbidden by Section 319 of the Act. No case is so exceptional and no equity so strong as to warrant this sort of statutory destruction.

Actually, however, the matters at issue in these cases are not exceptional or even unusual in any sense of the word. Admittedly, the background and history preceding the Commission's decision of September 1958, was a long and involved one, but even that portion of the KOB-WABC controversy, as previously explained by Hubbard,<sup>5/</sup> was not otherwise exceptional. Prior to September 3, 1958, the Commission was simply exercising its rule making authority and meeting the obligations imposed on it by Section 303(a) through (f) of the Communications Act, the objective being, if the public interest would be served thereby,

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<sup>5/</sup> See pages 13-18, and 21-24, Brief for Intervenor, Albuquerque Broadcasting Company in Case Nos. 15,399 and 15,400 [American Broadcasting-Paramount Theatres, Inc., v. Federal Communications Commission, 108 U.S. App. D.C. 83, 280 F. 2d 631 (1960)].



to change the classification of the frequency 770 kilocycles and the manner of assigning that frequency to broadcast stations.

Admittedly this process was time consuming, but the Commission finally resolved the matter by changing its rules to permit two stations to operate on the frequency and this Court affirmed the action in its 1960 opinion. Thereafter, in accordance with well recognized and long-standing practice and procedure, and as contemplated by Section 308 of the Act, applications for 770 kilocycles consistent with the new rule could be filed. Such a result was known, or certainly should have been known by all concerned, and particularly should have been known by one having as much longevity in broadcasting as ABC, long before the rule was changed. The Commission's September 3, 1958, decretal clause, ordering the early filing of the WABC renewal application and granting leave for ABC to file (as well as strongly suggesting that ABC should file) a timely application for modification of the WABC facilities, therefore, served only to insure that what was to be expected in the normal course of events was properly timed and coordinated so that the public interest determination leading to the amendment of the rule could be expeditiously and effectively implemented. See Albuquerque Broadcasting Co. 16 Pike & Fischer RR 765, 880-882.

If ABC did not appreciate the significance of the rule amend-

ment prior to its adoption, there certainly was no reason why it should not have completely understood the situation after reading the Commission's Order of September 3, 1958. At that time, ABC had the choice of filing only its application for renewal of WABC's non-directional license or of also filing a timely application for a construction permit looking toward the modification of the WABC facilities to conform with the September 1958 Decision.

ABC chose only to file the renewal application, a course of action entirely proper, in view of the permissive nature of the new rule, although difficult to understand in light of well known licensing conditions and requirements, the public interest determination in the rule making proceeding, and the Commission's specific suggestion that a modification application also be filed by ABC. In any event, ABC elected not to file an application for a construction permit and elected to stand on its renewal application alone, even after the Commission issued a Public Notice on July 11, 1961, announcing that Hubbard's mutually exclusive application for New York City would be ready for processing on August 14, 1961. (See "Standard Broadcast Applications Ready and Available for Processing Pursuant to Section 1.354(c) of the Commission's Rules - List No. 23" attached hereto as Appendix C).

The only unusual feature of this proceeding, therefore, is the

extent to which the Commission has gone, and is willing to go, to extricate ABC from a position it has voluntarily assumed and persistently refused to relinquish.

#### IV.

The Record In This Proceeding Contains Neither Evidence Nor Findings As To The Importance Of A Local New York Outlet to the ABC Network.

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One other assertion of Appellee-Respondents requires comment. At page 32 of their brief it is stated, in effect, that ABC should be permitted to amend the WABC renewal application to remove its unacceptable features because denial "would be contrary to the public interest, in light of the evidence in the record as to the importance of a New York outlet to the ABC network". (Underlining supplied.) In this connection, the Commission's Decision reads as follows: (R. 839)

"...The evidence herein, while falling far short of that which would require alteration of the Commission's 1958 Decision, does persuade the Commission that ABC should not be deprived of its New York outlet without a comparative hearing on the comparative merit of any application filed by it for directionalized operation, divorced from the 307(b) considerations of the instant proceeding..."

While these assertions are not considered material insofar as Hubbard's appeal is concerned, it should be pointed out to the Court that there is not one iota of evidence in the record of this proceeding having to do with the importance of a New York outlet to

the ABC network. That question was not at issue, no evidence was directed to the question, and the Commission made no findings on which such a conclusion could be based. The statement in the brief is nothing more than a self-serving distortion, not only of the record of this proceeding but also of the Commission's Decision.

The statement in the Commission's Decision is itself quite meaningless. In view of the extremes to which the Commission has already gone to avoid denying the WABC renewal, any evidence, relevant or irrelevant, material or immaterial, competent or incompetent, would be expected to persuade the Commission not to deprive ABC of its New York outlet. Suffice it to say that if the Commission has been so persuaded it cannot find support for its persuasion in the record of this proceeding. More important, its persuasion cannot take precedence over the law which demands that the WABC renewal application be denied if the Commission finds that the public interest would be better served by the grant of some other mutually exclusive application. Hubbard's New York application is mutually exclusive with the WABC renewal application and the Commission has already determined, in its September 3, 1958, Decision, that the grant of an application proposing an operation identical to that proposed in Hubbard's application would better serve the public interest than would the non-directional operation proposed in the WABC renewal application.

Summary

These cases are before this Court because the Commission has refused to designate Hubbard's application for a construction permit for a new station to operate on the frequency 770 kilocycles in New York City for a comparative hearing with an application for renewal of the license of Station WABC which now operates on the frequency 770 kilocycles in New York City and because the Commission has decided that, rather than so designate these applications, it will designate Hubbard's application for hearing with an application for modification of WABC's facilities which application has not been filed with the Commission.

Hubbard objects to this course of action because it constitutes a grant of the WABC renewal application and consequently an unlawful denial of Hubbard's application within the meaning of the Ashbacker doctrine (Ashbacker v. Federal Communications Commission, *supra*). The following is a summary of legal principles supporting this position which, Hubbard submits are controlling:

- A. The Congress has expressly provided that no broadcast station license shall be granted for a longer term than three years and once such a license has expired by its terms, the station involved may continue to operate only under the statutory authority of Section 307(d) of the Communications Act of 1934, as amended, and only until the Commission grants or denies the station's application for renewal of license (FCC Form 303).
- B. If a station's application for renewal of license is

denied, its operating authority ceases and the Commission has no power to permit the station to continue operating.

- C. The Commission does not have the power to authorize the operation of facilities or apparatus yet to be constructed by acting on an existing station's application for renewal of license and such an application may not be amended to specify unconstructed facilities or apparatus. The only way an existing station may be authorized to change its facilities or to install new apparatus is by first filing an application for a construction permit as provided by Section 319 of the Act.
- D. A station may legally continue to operate while an application for a construction permit for new facilities is processed, and while the new facilities are being constructed, only if it possesses a valid license which had not expired by its terms at the time the application for construction permit (FCC Form 301) was filed.

In the light of the foregoing principles it can only be concluded that the Commission's action of July 8, 1963, insofar as it authorizes the continued operation of WABC while an application for construction permit is filed, processed, and implemented, is, as a matter of law, a grant of the WABC renewal application. Such action has deprived Hubbard of its legal right to a comparative hearing with the WABC renewal application and has, in fact and in law, resulted in a denial of Hubbard's New York City application.

It should also be noted in concluding, that Hubbard was also an applicant in this proceeding for improved facilities for Station KOB, Albuquerque, New Mexico. While the Commission's decision



of July 8, 1963, grants Hubbard's KOB application, it has, by permitting WABC to continue its non-directional nighttime operation actually given KOB only a partial grant thus foreclosing that station from serving the populations and areas the September 3, 1958 Decision determined should be served. For this reason too the July 8, 1963 Decision, insofar as it grants rather than denies the WABC renewal application, must be reversed.

Respectfully submitted,

FRANK U. FLETCHER

ROBERT L. HEALD

EDWARD F. KENEHAN

Attorneys for  
Hubbard Broadcasting, Inc.

Of Counsel:

SPEARMAN AND ROBERSON

1023 Munsey Building  
Washington, D. C.

January 15, 1964

APPENDIX A

STATUTES:

Communications Act of 1934, as amended, 47 USC 151, et seq:

Sec. 3. For the purposes of this Act, unless the context otherwise requires --

\* \* \*

(bb) "Station license," "radio station license," or "license" means that instrument of authorization required by this Act or the rules and regulations of the Commission made pursuant to this Act, for the use or operation of apparatus for transmission of energy, or communications, or signals by radio by whatever name the instrument may be designated by the Commission.

\* \* \*

(dd) "Construction permit" or "permit for construction" means that instrument of authorization required by this Act or the rules and regulations of the Commission made pursuant to this Act for the construction of a station, or the installation of apparatus, for the transmission of energy, or communications, or signals by radio, by whatever name the instrument may be designated by the Commission.

\* \* \*

Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall --

- (a) Classify radio stations;
- (b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;
- (c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;
- (d) Determine the location of classes of stations or

individual stations;

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act:

Provided, however, that changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

\* \* \*

Sec. 319 (a) No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission. The application for a construction permit shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant.

(b) Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the

time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee.

(c) Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit. The provisions of section 309 (a), (b), (c), (d), (e), (f), and (g) shall not apply with respect any station license the issuance of which is provided for and governed by the provisions of this subsection.

(d) A permit for construction shall not be required for Government stations, amateur stations, or mobile stations. With respect to stations or classes of stations other than Government stations, amateur stations, mobile stations, and broadcasting stations, the Commission may waive the requirement of a permit for construction if it finds that the public interest, convenience, or necessity would be served thereby: Provided, however, That such waiver shall apply only to stations whose construction is begun subsequent to the effective date of the waiver. If the Commission finds that the public interest, convenience, and necessity would be served thereby, it may waive the requirement of a permit for construction of a station that is engaged solely in rebroadcasting television signals if such station was constructed on or before the date of enactment of this sentence.

# APPENDIX B

F.C.C. FORM NO. 352  
REV. JANUARY, 1951

## UNITED STATES OF AMERICA FEDERAL COMMUNICATIONS COMMISSION

File No. BR-167  
Call Letters N A B C

### STANDARD BROADCAST STATION LICENSE FOR MAIN TRANSMITTER

Subject to the provisions of the Communications Act of 1934, subsequent Acts, and Treaties, and Commission Rules made thereunder, and farther subject to conditions set forth in this license, the LICENSEE

#### AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.

is hereby authorized to use and operate the radio transmitting apparatus hereinafter described for the purpose of broadcasting for the term beginning June 1, 19 57, and ending June 1, 19 60  
(9 a.m., Eastern Standard Time) (9 a.m., Eastern Standard Time)

The licensee shall use and operate said apparatus only in accordance with the following terms:

1. On a frequency of 770 kc. antenna current, 16.3 amperes
2. With 50 kilowatts power non directional antenna nighttime [ antenna resistance, 188 ohms  
antenna current, 16.3 amperes  
antenna resistance, 188 ohms
- and 50 kilowatts power non directional antenna daytime [ antenna resistance, 188 ohms

2. During the following period or periods of time:

Unlimited Time.

4. With the station located at:  
New York, New York

5. With the main studio located at:  
39 West 66th Street  
New York, New York

The apparatus herein authorized to be used and operated is located at:  
Lodi (Bergen County)  
New Jersey

North Lat. 40° 52' 50"  
West Long. 74° 04' 12"

and is described as follows:

20A Type 50-B, Broadcasting Transmitter.

Antenna: 640' (648' overall height) uniform cross-section, guyed, series-excited, vertical steel radiator. Ground system consists of 90' ground screen and 84 radials average length 625'.

Obstruction marking specifications in accordance with paragraphs 1, 3, 12 and 20 of FCC Form 715 attached.

The Commission reserves the right during said license period of terminating this license or making effective any changes or modification of this license which may be necessary to comply with any decision of the Commission rendered as a result of any hearing held under the rules of the Commission prior to the commencement of this license period or any decision rendered as a result of any such hearing which has been designated but not held, prior to the commencement of this license period.

This license is issued on the licensee's representation that the statements contained in licensee's application are true and that the undertakings therein contained so far as they are consistent herewith, will be carried out in good faith. The licensee shall, during the term of this license, render such broadcasting service as will serve public interest, convenience, or necessity to the full extent of the privileges herein conferred.

This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequency designated in the license beyond the term hereof, nor in any other manner than authorized herein. Neither the license nor the right granted hereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934. This license is subject to the right of use or control by the Government of the United States conferred by section 606 of the Communications Act of 1934.

1 This license consists of this page and pages 57.  
Dated this 29 day of May, 19 57

FEDERAL COMMUNICATIONS COMMISSION

*Manly Jane Morris*



607

APPENDIX C

FCC 61-866

6818

FEDERAL COMMUNICATIONS COMMISSION  
Washington 25, D. C.

PUBLIC NOTICE-B  
July 11, 1961

STANDARD BROADCAST APPLICATIONS READY AND AVAILABLE  
FOR PROCESSING PURSUANT TO SECTION 1.354(c)  
OF THE COMMISSION'S RULES - LIST NO. 23

Notice is hereby given, pursuant to Section 1.354(c) of the Commission Rules, that on August 15, 1961, the standard broadcast applications listed in the attached Appendix will be considered as ready and available for processing, and that pursuant to Section 1.106(b) (1) and Section 1.361(b) of the Commission Rules, an application, in order to be considered with any application appearing on the attached list or with any other application on file by the close of business on August 14, 1961 which involves a conflict necessitating a hearing with an application on this list, must be substantially complete and tendered for filing at the offices of the Commission in Washington, D. C. by whichever date is earlier: (a) the close of business on August 14, 1961, or (b) by the earlier effective cut-off date which a listed application or any other conflicting application may have by virtue of conflicts necessitating a hearing with applications appearing on previous lists.

The attention of any party in interest desiring to file pleadings concerning any pending standard broadcast application pursuant to Section 309(d) (1) of the Communications Act of 1934, as amended, is directed to Section 1.359(f) of the Commission Rules for provisions governing the time of filing and other requirements relating to such pleadings.

Attachment: Appendix

Adopted: July 6, 1961



APPENDIX

Applications from the top of the processing line:

\*\*\*

Applications on which 309(b) letters have been issued:

BP-13932 NEW, New York, New York  
KSTP, Inc.  
Req: 770 kc, 50 kw, DA-N, U

\*\*\*

REPLY BRIEF FOR PETITIONER-APPELLANT

**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,567

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

*Petitioner,*

v.

UNITED STATES OF AMERICA  
and

FEDERAL COMMUNICATIONS COMMISSION,

*Respondents,*

HUBBARD BROADCASTING, INC.,

*Intervenor.*

No. 18,046

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

*Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION,

*Appellee,*

HUBBARD BROADCASTING, INC.,

*Intervenor.*

On Petition to Review and Appeal from Decisions and Orders of the  
Federal Communications Commission

United States Court of Appeals  
for the District of Columbia Circuit

FILED JAN 15 1964

*Nathan J. Paulson*  
CLERK

January 15, 1964.

JAMES A. MCKENNA, JR.

VERNON L. WILKINSON

McKenna & Wilkinson  
1735 DeSales St., N. W.  
Washington, D. C. 20036

*Attorneys for  
Petitioner-Appellant.*

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## MISCELLANEOUS

* "Clear Channel Broadcast Stations," Hearings, Subcommittee of House Committee on Interstate and Foreign Commerce on H. R. 8210 et seq., 87th Cong., 2d Sess. . . . .	3
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# United States Court of Appeals

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---

On Petition to Review and Appeal from Decisions and Orders of the  
Federal Communications Commission

---

REPLY BRIEF FOR PETITIONER-APPELLANT

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**A. Matters Not Controverted.** — The answering briefs of counsel for the Commission and for intervenor are no less revealing for matters left unmentioned than for those discussed.

Opposing counsel nowhere deny, nor could they, that each of the flagship stations for the three principal radio networks (ABC, CBS, and NBC) presently provides a primary and secondary service to some 42,000,000 persons (see ABC Br. pp. 24-25), whereas under the disparate actions taken by the Commission in Dockets 6584 and 6741 WABC's coverage would be reduced by almost 18,000,000 persons while WCBS and WNBC will continue as heretofore to serve some 42,000,000 persons (WABC Ex. 101, p. 11; R. 96, 101, 103; 35 FCC 37, para. 3; ABC Br. pp. 26-27).

Opposing counsel nowhere question that the areas and populations which WABC would thus lose already receive fewer primary and secondary services from ABC owned or affiliated stations than they receive from CBS and NBC owned or affiliated stations, with the ABC radio network thus less able to bear coverage losses of that magnitude (WABC Ex. 101, pp. 20, 21, 23, 25, 27, 28, 30; R. 105, 106, 108, 110, 112, 113, 115). Nor do they deny, as a result of the actions here complained of, that some 850,000 persons who presently receive a primary service from WABC (in some instances within 40 miles of New York City ) would hereafter be dependent on an intermittent skywave signal from a single station (that of WLS in Chicago) for the meritorious program service provided by the ABC radio network (WABC Ex. 101, pp. 15, 25; R. 100, 110, 804-805), nor that almost 16,000,000 persons to whom WABC would cease to provide a skywave service (of whom 5,667,808 are dependent on skywave signals for a radio service of any kind) would hereafter be dependent on intermittent skywave signals from 0-2 (rather than 1-3) stations for the programs presently provided by the ABC radio network, whereas those same

persons will continue as heretofore to have from 5-9 and 3-10 skywave services by which to receive the programs of the CBS and NBC radio networks (WABC Ex. 101, pp. 15, 16, 18; R. 100, 101, 103, 804-805; ABC Br. pp. 28-30).

Opposing counsel nowhere dispute Dr. Kear's uncontradicted testimony that one or two skywave signals are not a dependable source for a given program service to persons (as here) not receiving an interference-free primary signal from other stations carrying those same programs (Tr. 117-119; cf. 35 FCC 61, para. 48), meaning that almost 17 million persons, in the event WABC were to directionalize, would have no means by which to receive the programs of the ABC radio network in those instances where WLS or KXEL were not ordered by a given sponsor, or where those stations substituted a local show, or where because of talent or advertiser conflicts they failed to carry a given network feed (Tr. 292-295; ABC Br. p. 30).

Nor is it denied, as a result of the dissimilar actions taken in Dockets 6584 and 6741, (a) that the frequency 770 kc is the only one of the 25 Class I-A channels which has been ordered broken down to permit two Class I operations thereon; (b) that WABC alone of the 25 dominant Class I-A stations is not being protected to the extent of its present usable service (i.e., to its 0.5 mv/m 50% skywave contour); (c) that WABC is the only one of the 25 Class I-A stations which is being required to directionalize, and in doing so to curtail its present coverage by almost 18 million persons; (d) that the frequency 770 kc alone of the 25 Class I-A clears is being shorn of all potentiality for superpower (Hearings, p. 238); and (e) that ABC is being made the victim and required to bear the burden of providing a solution to a problem arising out of matters for which ABC was in no way responsible (ABC Br. pp. 27-28, 36-41).

Nor is it controverted that the Commission, when it looked at 770 kc in 1963, was confronted with a quite different situation than in 1958—



by reason of significant intervening changes in allocation philosophy (ABC Br. pp. 36-39); by reason of this Court's intervening decision of May 27, 1960 (108 U. S. App. D. C. 83, 87-88) cautioning the Commission that ABC should not be forced to share a channel if other networks (in the then undecided Clear Channel Proceeding) were given full use of clear channels (see ABC Br. pp. 20-23); and by reason of new data which ABC had been allowed to adduce for the first time in the further hearing ordered in Docket 6584 (ABC Br. pp. 30-34, 39-41).

And though expressly invited to do so in our opening brief (ABC Br. pp. 44-46), opposing counsel nowhere attempt to explain why the needs of white areas in New Mexico for a primary nighttime service (cf. FCC Br. p. 4) are so overpowering in Docket 6584 that they can only be met by a Class I operation at the expense of some 18,000,000 persons in the east who would be left with no means (other than 0-2 fading and fluctuating skywave signals) by which to receive an admittedly meritorious program service furnished by the ABC radio network, while the equally sizable white area populations in the other Rocky Mountain states must be content in Docket 6741 with lesser primary coverage provided by Class II-A operations. Nor do they attempt to explain why the Rocky Mountain area is so desperately in need of an additional skywave service that 770 kc must be broken down in Docket 6584 for dual Class I use, with the aforementioned attendant consequences, whereas that need is not such as to require any of the other 24 Class I-A channels to be similarly broken down in Docket 6741 for the purpose of providing additional skywave service to the Rocky Mountain states.

In short, apparently realizing that the least said about the merits the better, in a situation where the actions of the Commission are as unjust and inequitable as here, opposing counsel seek to foreclose judicial review by arguing (FCC Br. pp. 15, 17) that most of the matters raised

by ABC were adversely resolved by this Court in its decision of May 27, 1960 (108 U. S. App. D. C. 83). We do not so read that decision.

**B. ABC's Contentions are not Res Judicata.** — Knowing that this Court is meticulously careful in its choice of words,<sup>1</sup> its statement in the May 27, 1960 decision that "Any failure by the Commission to give due consideration to ABC's claims for treatment comparable to that accorded other networks, when raised in an appropriate manner, may be brought to the courts for review" (108 U. S. App. D. C. 83, 88), should without more foreclose a plea of res judicata.

And any conceivable ambiguity in this and other portions of the May 27, 1960 decision (108 U. S. App. D. C. 83, 87-88) becomes nonexistent if one bears in mind the then posture of the proceedings in Docket 6584 and Docket 6741. From the reference in the 1960 decision itself to the "now pending" clear channel proceeding, it is abundantly apparent that this Court was quite aware that no final decision had yet been issued in Docket 6741 (108 U. S. App. D. C. 83, 87).

This Court knew, too, from the Commission's jurisdictional objections to ABC's Section 402 (b) appeal in Case No. 15399 that the Commission's September 3, 1958 decision in Docket 6584 was not appealable at

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<sup>1</sup> Compare this Court's directive in 1951 that an interim solution should be found "with all deliberate speed" (89 U. S. App. D. C. 298, 307) and this Court's subsequent statement in 1956 that it did not thereby "intend to countenance a continuation of KOB's infringing status for five years beyond the ten that had then passed" (Order of September 27, 1956 in Case No. 12883, 14 RR 2020). Similarly, compare this Court's action "retaining jurisdiction" and "maintaining the status quo" in the Miami and Boston TV cases and its later ruling that the Commission's subsequent findings and conclusions in those cases should first be submitted to this Court (Massachusetts Bay Telecasters v. Federal Communications Commission, 111 U. S. App. D. C. 145, 295 F. 2d 131 (1961)). Likewise, compare this Court's 1961 conclusion in Sangamon (111 U. S. App. D. C. 113) that "it would not be appropriate for the Commission to determine in 1961 on the basis of a somewhat supplemental record where and to whom VHF Channel 2 might be assigned," and its subsequent ruling that such language was no less applicable to Terre Haute than to St. Louis (Fort Harrison Telecasting Corp. v. Federal Communications Commission, Case No. 17278, Opinion of June 27, 1963).

that juncture — with no applications there granted and with none denied. That proceeding had been expressly "left open" for the purpose of considering adjudicatory matters as might result from the actions there taken (25 FCC 794, para. 57). Hence, the only final action, of which review could then be had,<sup>1</sup> was the separate Order of the same date adding a footnote to Rule 3.25 stating that "On the frequency 770 kc two Class I stations may be assigned."<sup>2</sup>

Thus, though ABC bitterly complained in 1960 that as a result of being buffeted back and forth between Docket 6584 and 6741, with the fate of 770 kc relegated to Docket 6584 after the further hearing ordered in 1955 had been held, and with the Commission having issued its September 3, 1958 decision in Docket 6584 on the basis of an allocation philosophy embodied in the Second Report of April 1958 in Docket 6741 thereafter tentatively repudiated in the Third Report of September 1959, the fears there expressed by ABC that it was about to end up with flagship facilities for its radio distinctly inferior to those of CBS and NBC were at that point premature — with no final decision yet issued in either Docket 6584 or Docket 6741.

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<sup>1</sup> Along with its petition to review that Order (Case No. 15400), though ABC out of an abundance of caution filed an appeal under 47 U.S.C. Sec. 402(b) from the September 3, 1958 decision (Case No. 15399), counsel for the government properly pointed out that a 402(b) appeal would not lie, with ultimate review by this Court accordingly restricted to the September 3 Order (Case No. 15400). See 108 U. S. App. D. C. 83, 88 (1960). Though stating in its current brief (FCC Br. p. 5) that ABC appealed from the September 3, 1958 decision (25 FCC 683), Commission counsel make no mention of the jurisdictional objections thus interposed to that appeal.

<sup>2</sup> Commission counsel's assertion (FCC Br. pp. 17-18) that ABC's subsequently filed application for renewal of its non-directional operation "was patently inconsistent with the amended Section 3.25" and that "the Commission could have dismissed that application without hearing" are belied by the following statement of the Commission itself in its Clear Channel Report (31 FCC 595, para. 83): "Since the rule amendment is phrased in permissive rather than in mandatory terms, WABC's renewal application is not technically in conflict with the amended rules."

Bearing the foregoing considerations in mind, the admonitions and warnings contained in this Court's May 27, 1960 decision can, we submit, have but one meaning.

Though this Court there concluded that the Commission had not "erred in not assigning KOB to 1030 kc", the Commission was explicitly told that the position of ABC as a network should not be "permanently prejudiced by forcing it to share a channel [as contemplated in Docket 6584] if other networks are given full use of clear channels [in the then undecided Clear Channel Proceeding]". The Commission was further told that any such inequity (i.e., unequal assignment of clear channels for their flagship operations), if it exists or is permitted to occur, should be cognizable by the Commission "even though the assignment of KOB to 770 kc is permitted to continue". And then, as though to remove any possible ambiguity, this Court went on to say: "In other words, the Commission should seek to provide channel facilities to the ABC network on a basis which is fair and equitable in comparison with other networks" — with no requirement that ABC place a dollar evaluation (running into 7, 8, or 9 figures) on the damages it would suffer if forced to share a channel while the other networks were given full use of their clears.<sup>1</sup>

Though refraining from prescribing the precise method by which any such channel inequality (if permitted to arise) should be rectified, this Court indicated that this could be accomplished "in the Clear Channel Proceeding now pending", in a proceeding based on applications filed by ABC, or in a proceeding initiated by the Commission sua sponte. And

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<sup>1</sup> Although prejudice was in fact shown by ABC (see ABC Br. pp. 30-35), such gilding of the lily was not required under the precisely worded 1960 admonitions of this Court, despite Commission counsel's contrary assertions on this score (FCC Br. pp. 9, 15, 20-21, 26). Both the Commission and its counsel concede that ABC has wound up with a channel facility inferior to those of NBC and CBS (FCC Br. pp. 10-11). Under this Court's 1960 mandate no further showing was required.

as though to forestall any plea of res judicata, this Court explicitly stated that any failure to give due consideration to ABC claims for treatment comparable to that accorded to other networks would be reviewable by the Courts. Finally, this Court was careful to note that it was "for these reasons and on the basis stated, we affirm the Commission's order. We need not and do not pass on any contentions of the parties not here discussed" (108 U. S. App. D. C. 83, 87-88).

Thus, ABC's contentions (1) that it has ended up with unequal channel facilities by being required to share a channel while CBS and NBC have been accorded full use of their clears — as shown by engineering and non-engineering data adduced in the further hearing in Docket 6584 (ABC Br. pp. 20-35); (2) that intervening changes in allocation philosophy, the new facts thus adduced, and this Court's intervening decision clearly require a different result in 1963 from that reached in 1958 (ABC Br. pp. 35-41); and (3) that public interest considerations and this Court's 1960 mandate require that 770 kc be broken down in the same fashion as the eleven channels which were broken down for Class II-A use in Docket 6741 (ABC Br. pp. 41-48), are properly before this Court.

**C. Subsequent Conflicting Actions by the Commission —** Notwithstanding the clear-cut admonitions and warnings by this Court in 1960, the Commission in its tentatively announced conclusions of June 1961 in the Clear Channel Proceeding did precisely what this Court had warned against. It required ABC to share its clear channel with KOB by ordering WABC to directionalize, at a cost which may run well into six figures, and in doing so to curtail its coverage by almost 18,000,000 persons, while at the same time affording CBS and NBC full use of their clears by protecting WCBS and WNBC to the limit of their generally usable service (i.e., to their 0.5 mv/m 50% skywave contour) — with both stations

retaining a valuable potentiality for superpower (750 kw).<sup>1</sup>

Thus, when the Commission got around again to looking at Docket 6584 in July of 1961, it apparently realized (in view of its "left open" action in 1958, this Court's decision in 1960, and the tentatively announced conclusions in Docket 6741) that the ultimate fate of 770 kc had not been finally resolved. Accordingly, the Commission decided sua sponte, in line with one of the suggested procedures mentioned by this Court in its 1960 decision, to use Docket 6584 as a vehicle to discharge this Court's 1960 mandate (R. 7-14). To that end the Commission ordered a "further hearing" for the purpose of determining whether the matters adverted to by this Court override "the 307(b) determination" previously made (R.13, ~~para.~~ 11) and whether the 1958 result should be varied (R. 14, Issues 1 and 2).

The Commission soon let it be known that ABC was being accorded a hearing in name only, with the result to all intents and purposes predetermined. Within six weeks after having thus ordered a further hearing in Docket 6584 (July 27, 1961), the Commission on September 14, 1963, released its formal Report in the Clear Channel Proceeding (31 FCC 565). Although indicating at one point in that Report, after having quoted from 108 U. S. App. D. C. 87-88, that "it is not appropriate here to determine finally the exact form of operations which will be permitted on the channel 770 kc" (31 FCC 565, 595, para. 85), the Commission a few paragraphs later explicitly stated: " . . . we here affirm our KOB decision insofar as it determined that a major unlimited-time facility should be assigned to New Mexico on 770 kc and amended rules to permit the assignment of two Class I stations on that frequency" (31 FCC 565, 597, para. 90). In

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<sup>1</sup> As heretofore pointed out (ABC Br. p. 22, fn. 1), the Commission could have heeded this Court's 1960 equality admonitions in the Clear Channel Proceeding in either of two ways — by ordering WNBC and WCBS to directionalize so as to accommodate Class I operations on 660 kc and 880 kc in the west (in line with the 1958 action taken on 770 kc), or conversely it could have given WABC in 1961 the same protection on 770 kc as it there accorded WCBS and WNBC.



short, this was a prejudgment of the very matter on which a further hearing had been ordered only six weeks previously in Docket 6584, a hearing which was then just getting under way.

To make matters worse, within a few days after releasing its Clear Channel Report, the Commission summarily rejected ABC's request that other frequencies be considered in the 1961 further hearing ordered in Docket 6584 (R. 35-36), on the ground that this Court (at a time when the Clear Channel Proceeding was still unresolved) had affirmed the Commission's 1958 action restricting the 1955 further hearing to two frequencies. The Commission thus completely ignored this Court's warning that if the other networks were subsequently accorded full use of clear channels in Docket 6741, such inequity must be rectified, sua sponte or otherwise, and for that purpose that other eastern clears might well be considered.

Then, to add insult to injury, after having placed ABC in a straight jacket at the hearing on what evidence would or would not be admitted, the Examiner himself, not aware that the engineering evidence which he had received squarely showed such to be the precise loss confronting ABC, stated (35 FCC 57, Fdg. 38): " . . . if a network demonstrates that it, as a network, has, in fact, been deprived of service area and audience equal to approximately 10% of that available in the entire country [i.e., approximately 17,000,000 persons] it may well have made a prima facie showing of prejudice and adverse effect vis-a-vis its competitors who are not similarly deprived" (35 FCC 57, para. 38).<sup>1</sup>

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<sup>1</sup> With ABC having demonstrated in its exceptions that such was indeed the precise coverage curtailment confronting ABC (R. 757-774), the Commission subsequently excised his erroneous engineering findings (R. 421-458, para. 45, 46, 49-51, 53, 54, 56-58, 69-75; 35 FCC 36,43), and then blithely proceeded to adhere to his conclusion that no prejudice had been shown (cf. FCC Br. p. 9). Commission counsel's reliance (FCC Br. p. 25) on the Examiner's assertion that local stations have a greater impact on listeners than outside stations (35 FCC 55, para. 34) is particularly misplaced. As shown by ABC in its exceptions [continued]

And then to climax everything, after stating at one point in its July 3, 1963 decision that ABC should hereafter be accorded a comparative hearing with Hubbard's New York application, "divorced from the 307(b) considerations of the instant proceeding" (35 FCC 42, para. 17; cf FCC Br. p. 11), the Commission proceeded to deny various exceptions interposed by ABC to the Examiner's exclusionary rulings by stating that the proffered evidence was "directed to the already settled 307(b) question" (35 FCC 43, ruling on exceptions 15 and 31)!

In the light of such irreconcilable rulings by the Commission, within the four corners of the two decisions here appealed from, a reversal is mandatory if for no other reason than such conflicting assertions preclude this Court from discharging its review functions. Of one thing we can be sure — ABC has not been accorded the relief which this Court contemplated when it stated that ABC should not be forced "to share a channel if other networks are given full use of clear channels".

**D. Conclusion.** — ABC accordingly requests this Court to reaffirm the fact that it meant precisely what it said when it stated in 1960 that ABC should not be required "to share a channel if other networks are given full use of clear channels", and that "the Commission should seek to provide channel facilities to the ABC network which is fair and equitable in comparison with other networks." And to that end ABC requests this Court, as it did in its September 27, 1956 Order in Case No. 12,883

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[Footnote 1, page 10, continued]

(R. 734, Exception 34), that statement was made by the Examiner at a time when he misunderstood the engineering evidence and erroneously believed that the people thus lost to ABC had a choice of both primary and secondary signals for the programs of the ABC network, whereas in fact almost 17 million of the 18 million persons whom WABC would lose receive no primary service whatsoever from local stations affiliated with ABC and are thus entirely dependent on skywave signals from outside stations for the programs of the ABC radio network (see R. 804-805).

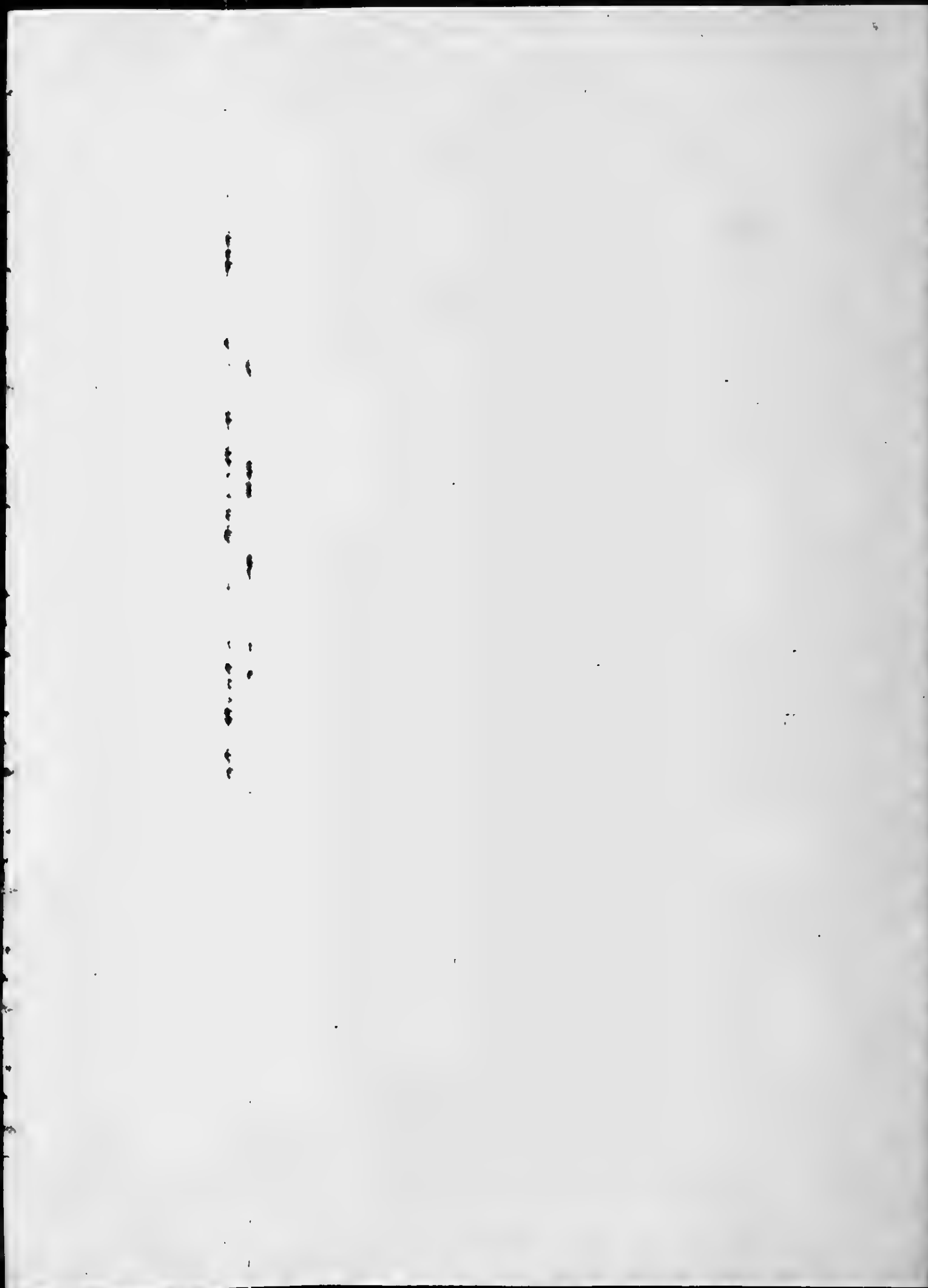
(14 RR 2020), to direct the Commission within 60 days to carry out this Court's 1960 mandate, either (a) by granting KOB Class II-A rather than Class I rights on 770 kc (50 kw, U, DA-N), or (b) by placing KOB on one of the other eleven channels broken down for Class II-A duplication in Docket 6741. If the latter approach is used, special consideration should be given to 1180 kc, the frequency from which KOB was shifted at the time of the NARBA shuffle in 1941 (thus giving rise to the so-called "KOB problem"), and which is now available (as it was not in 1941) for Class II-A duplication in the Rocky Mountain area.

Respectfully submitted,

JAMES A. McKENNA, JR.  
VERNON L. WILKINSON  
McKenna & Wilkinson  
1735 DeSales St., N. W.  
Washington, D. C. 20036

*Attorneys for  
Petitioner-Appellant*

January 15, 1964



**SEQ. #9**

# TITLE GUIDE

**United States Circuit Court Of Appeals**

**D.C. CIRCUIT**



**CASE NAME** HUBBARD BROADCASTING, INC. VS FEDERAL COMMUNICATIONS COMMISSION

**DATE** 1963

**DOCKET NO.** 18,045 AND 18,078

**OFFICIAL CITE NO.**

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COURT RECORDS DIVISION



FILED DEC 20 1963

BRIEF FOR INTERVENOR

*Nathan J. Paulson*  
CLERK

**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,045

137

HUBBARD BROADCASTING, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

Intervenor.

No. 18,078

HUBBARD BROADCASTING, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA

and

FEDERAL COMMUNICATIONS COMMISSION,

Respondents,

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

Intervenor.

Appeal from and Petition to Review Decision  
of the Federal Communications Commission

JAMES A. McKENNA, JR.

VERNON L. WILKINSON

McKenna & Wilkinson  
1735 DeSales Street, N.W.  
Washington, D. C. 20036

Attorneys for Intervenor,  
American Broadcasting-  
Paramount Theatres, Inc.

December 20, 1963

(i)

**STATEMENT OF  
THE QUESTIONS PRESENTED**

The questions presented in Case Nos. 18,045 and 18,078, as agreed to by appellee-respondents and by intervenor without prejudice to their positions on pending motions to dismiss the aforesaid appeals, are correctly set forth in the brief for appellant-petitioner.

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# **United States Court of Appeals**

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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No. 18,045

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HUBBARD BROADCASTING, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

Intervenor.

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No. 18,078

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Petitioner,

v.

UNITED STATES OF AMERICA

and

FEDERAL COMMUNICATIONS COMMISSION,

Respondents,

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

Intervenor.

---

Appeal from and Petition to Review Decision  
of the Federal Communications Commission

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## **BRIEF FOR INTERVENOR**

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### **COUNTERSTATEMENT OF THE CASE**

Intervenor, American Broadcasting-Paramount Theaters, Inc. (ABC), is the licensee of Station WABC, New York, N. Y. (770 kc, 50 kw, U). Heretofore, WABC has been the only station regularly and duly licensed to operate with 50 kw power both day and night on the U.S. Class I-A frequency of 770 kc.

However, by a Decision and a separate Order adopted September 3, 1958, in the "KOB proceeding" (Docket 6584), the Commission: (a) Added a footnote to Rule 3.25, stating that "On the frequency 770 kc two Class I stations may be assigned" (25 FCC 683, 805); (b) granted Hubbard Broadcasting, Inc. leave to amend its then pending application for Station KOB, Albuquerque, N. Mex. (BMP-1738) to request directional rather than nondirectional nighttime operation on 770 kc (25 FCC 683, 793, para. 56); (c) granted ABC leave to file an application for directional nighttime operation by WABC on 770 kc with specified parameters (25 FCC 683, 793, para. 56); (d) directed WABC to file its renewal application eleven months in advance of the expiration date of its then current license (25 FCC 683, 791-793, paras. 52-53, 56); and (e) stated that the proceedings in Docket 6584 were "to remain open for the purpose of considering further adjudicatory matters as may be based upon the orders herein directed to stations KOB and WABC" (25 FCC 683, 794, para. 57).

From the action thus taken by the Commission, ABC appealed to this Court (Case Nos. 15,399 and 15,400). In an Opinion issued May 27, 1960, although affirming the Commission's refusal to return KOB to 1030 kc, this Court stated that "we do not think that the position of ABC as a network should be permanently prejudiced by forcing it to share a channel [by Commission action taken in Docket 6584] if other networks are given full use of clear channels [in the yet to be decided Clear Channel proceeding in Docket 6741]"; that ABC was entitled to be heard further on that score; that "the Commission should seek to provide channel facilities to the ABC network on a basis which is fair and equitable in comparison with other networks"; and that "any failure by the Commission [sua sponte or otherwise] to give due consideration to ABC's claims for treatment comparable to that accorded other networks . . . may be brought to the courts for review." "For these reasons, and on the basis stated," this Court affirmed the September 3, 1958 Order. American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission, 108 U.S. App. D.C. 83, 87-88, 280 F.2d 631 (1960).



Some fourteen months later, with ABC having in the meantime filed for renewal of its long-held nondirectional license on 770 kc in New York City, with Hubbard having amended BMP-1738 to request directional Class I operation on 770 kc in Albuquerque,<sup>1</sup> and with Hubbard having also filed an application in February 1960 for WABC's facilities in New York City (specifying directional rather than nondirectional operation thereon), the Commission decided to wind up the unfinished aspects of the proceeding in Docket 6584, and at the same time to take care of the admonitions contained in this Court's 1960 opinion (R. 7-14). Curiously enough, because taken in advance of the release of a final report in the Clear Channel Proceeding (Docket 6741) stating precisely what was to be done with the flagship operations of NBC and CBS in New York, the Commission by a Memorandum Opinion and Order adopted July 27, released August 4, 1961, directed a further hearing in Docket 6584 on KOB's amended application and WABC's nondirectional renewal, on the question "whether the consideration of providing facilities to the ABC network in New York on a basis which is fair and equitable in comparison with other radio networks should vary the conclusion" reached in 1958 that WABC should directionalize and share its frequency with KOB (R. 7-14).

Elsewhere in that order (R. 13), in explanation of its refusal to include Hubbard's application for directional operation on 770 kc in New York City in the further hearing thus ordered in Docket 6584 (a hearing initially begun in 1944), the Commission stated that consideration would be given, in the event the 1958 result was adhered to, of allowing ABC a final opportunity to seek directionalized operation on 770 kc, and of then being accorded an Ashbacker hearing with Hubbard's application for WABC's New York facilities.

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<sup>1</sup> Both these applications were filed in response to the mandatory and/or permissive provisions of the 1958 decision (25 FCC 683, 794, para. 57; see also 31 FCC 595, para. 83; cf. Tr. 35).

In a subsequently taken appeal and petition for review (Case Nos. 16,577 and 16,578), Hubbard asked this Court to reverse the Commission's refusal to include its New York application in the further hearing there ordered. On motion of the Government, those appeals were thereafter dismissed by this Court as premature (order of October 27, 1961, rehearing denied January 15, 1962).

By decision released July 8, 1963 (35 FCC 36) the Commission, on the basis of the further hearing held in Docket 6584, (1) adhered to its 1958 conclusions, (2) granted the application of Hubbard Broadcasting, Inc. for modification of construction permit for Station KOB, Albuquerque, N. Mex. (770 kc, 50 kw, U, DA-N), and (3) denied the application of ABC for renewal of WABC's long-held license for nondirectional operation on 770 kc in New York City (770 kc, 50 kw, U), "without prejudice to reconsideration" if ABC files within a specified period an application for directional rather than nondirectional operation on 770 kc, with parameters in conformity with those specified in the 1958 decision (25 FCC 683, 696, para. 22).

From the foregoing action granting Hubbard Broadcasting, Inc. Class I rights on 770 kc for Station KOB in Albuquerque, and refusing to renew WABC's license for nondirectional operation on 770 kc in New York City, ABC appealed to this Court (Case No. 18,046). Hubbard Broadcasting, Inc. likewise appealed, purportedly under 47 U.S.C. Sec. 402(b)(1) and (6), claiming aggrievement because WABC's operation was not terminated pending judicial review of the foregoing decision, and because Hubbard's application for ABC's facilities on 770 kc in New York City was not forthwith granted (Case No. 18,045).

By motion filed August 21, 1963, ABC asked that Hubbard's appeal (Case No. 18,045) be dismissed, as premature and not presently reviewable under the provisions of 47 U.S.C. Sec. 402(b)(1) and (6). When Hubbard countered with a petition for review under 47 U.S.C. Sec. 402(a)

(Case No. 18,078), ABC likewise moved to dismiss that case as also premature. In responsive pleadings thereto, the Government supported both dismissal motions. By Orders entered October 1, 1963, this Court postponed to the merits the jurisdictional questions thus raised.

### STATUTES INVOLVED

Sections 402(a) and 402(b) of the Communications Act, so far as here pertinent, are worded as follows:

Sec. 402(a). Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in Public Law 901, Eighty-first Congress, approved December 29, 1950.

(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this Act whose application has been denied by the Commission or by any permittee under said section whose permit has been revoked by the Commission.

.....

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), and (4) hereof.

## SUMMARY OF ARGUMENT

1. The aspect of the July 8, 1963 decision of which Hubbard complains is the fact that the Commission, when it denied WABC's application for renewal of its long-held nondirectional facilities on 770 kc, did not forthwith grant Hubbard's application for directionalized operation on 770 kc in New York (BP-13932), and indicated instead that WABC would be afforded, in the event the July 8 decision was affirmed by this Court, a final opportunity to seek directionalized operation on 770 kc in New York (BP-13932), in which event ABC would be accorded a comparative hearing with Hubbard's New York application. The matters of which Hubbard thus complains are not presently reviewable under either of the statutory provisions which Hubbard invokes.

Since no application by Hubbard for a construction permit was denied by the July 8, 1963 decision, the matters here complained of by Hubbard are not reviewable under 47 U.S.C. Sec. 402(b)(1). And since Hubbard was clearly not aggrieved by a grant of its own application for Albuquerque, nor by a denial of WABC's nondirectional renewal (the only applications granted or denied by the July 8 decision), an appeal by Hubbard does not lie under 47 U.S.C. Sec. 402(b)(6).

With Hubbard's New York application as yet neither granted nor denied, the Commission's July 8 determination that WABC should be afforded an opportunity to seek directional facilities on 770 kc, in which event ABC would be accorded a comparative hearing with Hubbard's New York application, is interlocutory in character, and hence not reviewable at this juncture under 47 U.S.C. Sec. 402(a). Interstate Broadcasting Company v. United States, 109 U.S. App. D.C. 255, 257, 286 F.2d 539 (1960).

2. Even assuming that the matters of which Hubbard complains are presently reviewable, the Commission's determination that WABC should be afforded an opportunity to salvage something on 770 kc was a proper one. From this Court's qualified affirmance in 1960 of the

Commission's September 3, 1958 Order in Docket 6584, followed by the different treatment accorded 660, 770, and 880 kc in Docket 6741, it was patent to the Commission in 1961 that the manner in which 770 kc should hereafter be utilized had not yet been finally resolved. The Commission quite properly concluded that this allocation matter should be decided first — before any Ashbacker hearings were held on competing applications specifying modes of operations which might or might not comport therewith. WJR, The Goodwill Station v. Federal Communications Commission, 84 U.S. App. D.C. 1, 6, 174 F.2d 226 (1948); cf. Fort Harrison Telecasting Corp. v. Federal Communications Commission, 25 RR 2109 (U.S. App. D.C. (1963)).

## ARGUMENT

### I

#### The Matters of Which Hubbard Complains Are Not Reviewable at This Juncture Under Sections 402(a) or 402(b) of the Communications Act

Sections 402(a) and 402(b) of the Communications Act, under which review is here sought by Hubbard, are by definition mutually exclusive. Functional Music, Inc. v. Federal Communications Commission, 107 U.S. App. D.C. 34, 38, 274 F.2d 543 (1958). Thus, as a minimum, one or the other of Hubbard's two appeals must be dismissed. And if the matters which give rise to Hubbard's claim of aggrievement are not yet final, review cannot be had at this juncture under either section of the Act, and both appeals must be dismissed. Interstate Broadcasting Company v. United States, 109 U.S. App. D.C. 255, 257, 286 F.2d 539 (1960); Pauley v. Federal Communications Commission, 86 U.S. App. D.C. 294, 181 F.2d 292 (1950).

Though not so phrased, the aspect of the July 8, 1963 decision of which Hubbard complains is the fact that the Commission, when it denied WABC's application for renewal of its long-held nondirectional facilities

on 770 kc, did not forthwith grant Hubbard's application for directionalized operation on 770 kc in New York (BP-13932), and indicated instead that WABC would be afforded, in the event the July 8 decision was affirmed by this Court, a final opportunity to salvage something on 770 kc by the comparative hearing route (35 FCC 42, para. 17). So stripped of verbage, with Hubbard's New York application neither granted nor denied, the instant appeals are clearly premature.

A. Section 402(b). — Although Hubbard has carefully refrained from indicating which section of the Act, in its view, confers jurisdiction here, it would appear that its chief reliance is on Section 402(b): First, by reason of the fact that Hubbard made no attempt to invoke Section 402(a) until after ABC moved to dismiss the Section 402(b) appeal in Case No. 18,045; and second, by reason of Hubbard's labored contention that the July 8 decision granted WABC's renewal and denied Hubbard's application for New York (BP-13932). Such reliance on Section 402(b) is misplaced.

From the Commission's Memorandum Opinion of July 27, 1961 (R. 7-14) ordering a further hearing in Docket 6584 and from the caption there employed (see 35 FCC 36), it is abundantly clear that Hubbard's New York application (BP-13932) was not included in that proceeding. Hubbard was there told, a fact which Hubbard recognizes (Hubbard Br. pp. 5-6), that action on its application for WABC's facilities in New York would have to be held in abeyance until the unfinished aspects of the "KOB proceeding" (see 25 FCC 794, para. 57), including matters raised in the 1960 mandate of this Court (108 U.S. App. D.C. 83, 87-88), had been resolved.<sup>1</sup> There Hubbard was also told that, if at the conclusion of the further hearing in Docket 6584, the Commission adhered to its 1958 result and denied ABC's application for renewal of its nondirectional

<sup>1</sup> As made clear in WJR, The Goodwill Station v. Federal Communications Commission, 84 U.S. App. D.C. 1, 6, 174 F.2d 226 (1948), this Court does not direct, in advance, "the order in which the Commission shall consider its cases."



operation on 770 kc, consideration might be given to allowing ABC an opportunity to seek directionalized facilities on 770 kc, with any such application by ABC being subsequently accorded comparative consideration with Hubbard's New York application (R. 13, para. 12).

Thus, the only two applications included in the further hearing ordered in July of 1961 in Docket 6584 were the application by Hubbard on behalf of station KOB for directional rather than nondirectional facilities on 770 kc in Albuquerque (BMP-1738) and ABC's application for renewal of WABC's long-held license for nondirectional operation on 770 kc in New York City (BR-167), each of which was filed pursuant to authorizations or directives contained in the 1958 decision (25 FCC 793, para. 53, 56) — with that proceeding there left open for that very purpose (25 FCC 794, para. 57).

The further hearing thus ordered in 1961 was not subsequently expanded, sub silentio or otherwise, to include any additional applications. In fact, the decretal paragraph of the resultant decision of July 8, 1963, reads as follows (35 FCC 36, 42):

Accordingly, It is ordered, This 3d day of July 1963, that the application of Hubbard Broadcasting, Inc., for modification of construction permit of station KOB, Albuquerque, N. Mex., Is granted; and that the application of American Broadcasting-Paramount Theatres, Inc., for renewal of license of station WABC, New York, N. Y., Is denied, without prejudice to reconsideration if ABC files, within 30 days of the release date hereof, an application for modification of facilities on the frequency 770 kc in conformity with the parameters specified in paragraph 22 of the September 1958 decision herein (25 FCC 683, 16 R.R. 765).<sup>1</sup>

Certainly if the foregoing language is taken at face value, the matters of which Hubbard complains are not cognizable under Section

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<sup>1</sup> By Order released July 26, 1963, the running of the time limit there specified was stayed by the Commission "pending the issuance of a final court order concluding judicial review" (R. 856).

402(b)(1). The only person who can appeal under that provision is an applicant for a construction permit "whose application is denied by the Commission." The only application by Hubbard which was involved in the further hearing (which culminated in the July 8, 1963 Decision) was Hubbard's application for Class I rights on 770 kc in Albuquerque (BMP-1738). That application was granted, not denied. Hubbard's application for New York City (BP-13932) was not included in the further hearing ordered in 1961 in Docket 6584. It was neither granted nor denied.

Nor are the matters here raised by Hubbard reviewable under Section 402(b)(6). There, persons other than those whose applications are denied, who are aggrieved by action granting or denying a given application, may seek judicial review. Certainly Hubbard cannot claim "aggrievement" by reason of the grant of its own application for Albuquerque, the only application granted in that proceeding. Likewise, since Hubbard sought denial of WABC's nondirectional renewal, action which the Commission took, Hubbard cannot claim aggrievement on that score. No other applications were either granted or denied by the July 8, 1963 decision.

Confronted with these facts, Hubbard seemingly argues that the July 8 decision, though purporting to deny, in reality granted WABC's renewal and, though purporting not to act thereon, in effect denied Hubbard's New York application (cf. Hubbard Br. pp. 6, 7, 8, 15-18). To support that thesis Hubbard resorts to a hodge-podge of inconsistencies and to a distortion of the facts.

Initially, in its Statement of the Questions, Hubbard characterizes the Commission's action of July 8, 1963, with a fair degree of accuracy, as continuing the "operating authority of WABC while conditionally denying" WABC's renewal (Hubbard Br. p. i). Thereafter, in Hubbard's brief, that action progressively becomes something different. For example, in its Jurisdictional Statement, the July 8 decision is described

as action "granting for an indefinite period" WABC's renewal (Hubbard Br. p. 2). By the time we reach the Statement of Points the July 8 Decision is branded as action "granting the WABC renewal application" (Hubbard Br. p. 7), and it is so characterized throughout the remainder of the brief (Hubbard Br. pp. 8, 15-18).

No amount of semantics on Hubbard's part can obscure the fact that in the decretal paragraph of the July 8 decision, the Commission denied ABC's application for renewal of WABC's long-held license for nondirectional operation on 770 kc. In fact, it is that very action, coupled with the grant to KOB of Class I rights on 770 kc, which has given rise to ABC's appeal in Case No. 18,046. The fact that the denial, as thereafter modified, was "without prejudice to reconsideration" if ABC filed for directionalized facilities (in the event the July 8 decision was affirmed by the Courts), does not make that action any the less a denial. Carter Mountain Transmission Co. v. Federal Communications Commission, 321 F.2d 359, 25 RR 2055 (U.S. App. D.C. 1963), cert. den. December 16, 1963.

And the mere fact that WABC has been allowed to continue on the air while the correctness of the July 8 decision is being reviewed by the courts does not transform a denial into a grant, as those terms are used in 47 U.S.C. Sec. 402(b). It is not the policy of the Congress nor the practice of the Commission to terminate existing licenses, even in cases of misconduct, until matters raised in adjudicatory proceedings have been finally resolved. Cf. Federal Communications Commission v. WOKO, Inc., 329 U.S. 223 (1946). Both the Communications Act (47 U.S.C. Sec. 307(d)) and the Administrative Procedure Act (5 U.S.C. Sec. 1008) explicitly provide that existing licenses shall remain in effect pending final agency action thereon. And the Communications Act affords persons whose licenses have been denied by the Commission a right of judicial review (47 U.S.C. Sec. 402(b)(1)). Pending such review agency action failing to grant a given application is not final.

Although Hubbard argues, as a second string to its bow, that its New York application was denied by the July 8 decision, this argument is based throughout on the premise that the Commission in its July 8 decision granted WABC's application for renewal of license and thereby denied Hubbard's New York application. (Hubbard Br. pp. i, 8, 16). But that premise, as we have seen, is not in accord with the record.

In short, Hubbard's New York application is still pending and undisposed of. The only application included in the further hearing and on which action was taken in the July 8 decision was Hubbard's application for Albuquerque (which the Commission granted) and ABC's application for renewal of WABC's license (which the Commission denied). Hence, the matters of which Hubbard complains are not reviewable under Section 402(b) and Case No. 18,045 must, therefore, be dismissed.

B. Section 402(a). — In 1961, when the Commission failed to include Hubbard's New York application (BP-13932) in the further hearing there ordered in Docket 6584, Hubbard sought review of that action under each of the two jurisdictional sections of the Communications Act (Case Nos. 16,577 and 16,578). This Court subsequently dismissed both appeals as premature. No further action, one way or the other, was taken on Hubbard's New York application in the Commission's subsequent decision of July 8, 1963. There the Commission, as it indicated it might in its 1961 order, concluded that ABC (in the event the July 8, 1963 decision was affirmed) would be afforded a final opportunity to seek directionalized facilities on 770 kc — with the express caveat that if it did so it would then have to run the gauntlet of a comparative hearing with Hubbard's New York application.

Thus, stripped of all verbage, the action of the Commission which Hubbard wants reviewed at this juncture is the Commission's conclusion that ABC, in the event the July 8 decision is affirmed, should be allowed to request directionalized operation on 770 kc, meaning that instead of BP-13932 being granted to Hubbard forthwith, Hubbard would have to go through a comparative hearing for 770 kc in New York.

It scarcely requires citation of authority to substantiate the proposition that action by the Commission ordering a hearing on an application, no matter how unnecessary the applicant may feel such a hearing to be, is not immediately reviewable under either Section 402(a) or Section 402(b) of the Act. Cf. Johnston Broadcasting Co. v. Federal Communications Commission, 88 U.S. App. D.C. 90, 187 F.2d 202 (1950). The same is true where the Commission orders a comparative hearing on two applications, no matter how vociferously one of those applicants may argue that his would-be competitor's application is incomplete or untimely and thus not entitled to comparative consideration. Cf. Johnston Broadcasting Co. v. Federal Communications Commission, 85 U.S. App. D.C. 40, 175 F.2d 351 (1949). And what may be even more in point here, action allowing Applicant A to amend to eliminate a defect or deficiency which might otherwise be fatal in a comparative hearing with Applicant B. or which as a minimum would greatly reduce B's chances of ultimately prevailing, is not immediately reviewable by B under those sections of the Act. Cf. Pauley v. Federal Communications Commission, 86 U.S. App. D.C. 294, 181 F.2d 292 (1950).

As in the situations just cited, Hubbard's proper recourse is to preserve its exceptions to such interlocutory rulings, and in the event its application is ultimately denied to request review of errors which allegedly occurred along the way. WJR, The Goodwill Station v. Federal Communications Commission, 84 U.S. App. D.C. 1, 6, 174 F.2d 226 (1948). This is in line with the well established doctrine that, absent specific statutory provisions allowing interlocutory appeals, public policy does not favor burdening the federal appellate courts with interlocutory or piece-meal appeals nor with matters which may be mooted by action yet to be taken by the administrative agency itself. Here, if this Court concludes, on ABC's appeals, that the Commission's action allowing two Class I operations on 770 kc was erroneous, or if ABC (in the event of affirmance) does not file for directional facilities, or if Hubbard ultimately prevails in a comparative hearing for directionalized use of



770 kc in New York, all matters of which Hubbard now complains would become moot except possibly one — the fact that WABC is being allowed to continue to operate on 770 kc while these various matters are being litigated and the contemplated hearing is being held. But the continuation of existing services while substantial issues are being litigated and determined is, as we have seen, in line with well-established statutory policies, not to mention decisions of this Court and the Commission. Accordingly, Case No. 18,078 must likewise be dismissed as patently premature.<sup>1</sup>

## II

### Hubbard's Contentions, Even if Reviewable at This Juncture, Are in Any Event Without Merit

Turning to the merits, and even assuming *arguendo* that the matters of which Hubbard complains are presently reviewable, one underlying fallacy permeates Hubbard's entire brief — a failure to recognize what the Commission did and did not do in 1958 and what this Court did and did not do in 1960.

Even the Commission itself did not purport to write *finis* to Docket 6584 when it released its Decision of September 3, 1958. It there expressly stated that "These proceedings are to remain open for the purpose of considering further adjudicatory matters as may be based upon the orders herein directed to stations KOB and WABC" (25 FCC 794, para. 57).<sup>2</sup> To fully understand this action is must be

<sup>1</sup> Although not invoked in either case (Nos. 18,045 and 18,078), the matters of which Hubbard complains are likewise not reviewable at this juncture under section 10 of the Administrative Procedure Act (5 U.S.C. Sec. 1009). Cf. Hearst Radio v. Federal Communications Commission, 83 U.S. App. D.C. 63, 167 F.2d 225 (1948).

<sup>2</sup> As a matter of fact, with the record left "open" in Docket 6584 and with no grants made by the September 3, 1958 decision (25 FCC 683), the concurrently issued Order amending Rule 3.25 so as to "permit" two Class I stations on 770 kc was the only final action taken on September 3, 1958, which was at that point judicially reviewable. See 108 U.S. App. D.C. 83, 88, where this Court stated with meticulous care: "For these reasons, and on the basis stated, we affirm the Commission's Order."



remembered that after the Commission in May 1955 ordered a further hearing in Docket 6584, ABC asked that appropriate show-cause orders issue. That request was rejected by the Commission as premature (13 RR 873, para. 22). In line with this implied commitment that a show-cause hearing would be ordered at a later stage, the resulting Initial Decision made provision for the issuance of appropriate show-cause orders (J.A. 620-621) — with the burden of proceeding and the burden of proof to be borne by the Commission.

However, in its Decision of September 3, 1958, the Commission decided, in lieu of a show-cause hearing, to direct WABC to file its renewal eleven months in advance of its normal expiration, and to per-mit the parties to apply for directionalized facilities on 770 kc in accordance with certain specified parameters (25 FCC 791-794, paras. 52-53, 56-57), with the proceedings in Docket 6584 left open "for the purpose of considering further adjudicatory matters as may be based on the orders herein directed to stations KOB and WABC" (25 FCC 794, para. 57).

Pursuant to the foregoing provisions of the September 3, 1958 decision, KOB amended in due course its BMP-1738 application to request directional rather than nondirectional operation on 770 kc in Albuquerque. WABC similarly submitted (under protest because ordered in advance of the normally due date) its renewal application, requesting a continuation as heretofore of its nondirectional operation — as it had every right to do in view of the permissive language of the concurrently issued Order of September 3, 1958 (25 FCC 805), stating that "on the frequency 770 kc two Class I stations may be assigned" (see 31 FCC 595, para. 83).

Furthermore, at the time the Commission issued its September 3, 1958 decision and its Order amending Rule 3.25, the Commission knew that the results there reached would in all likelihood be appealed. They were (Case Nos. 15,399 and 15,400). As pointed out by ABC in its Briefs

in Case Nos. 17,567 and 18,046 (Br. pp. 8-10, 20-22), and notwithstanding Hubbard's contrary assertions (Hubbard Br. pp. 3, 9), this Court in its May 27, 1960 opinion in Case Nos. 15,399 and 15,400 did not, unqualifiedly and come what may, affirm the Commission's September 3, 1958 actions. American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission, 108 U.S. App. D.C. 83, 87-88, 280 F.2d 631 (1960). Although sustaining the Commission's refusal to return KOB to 1030 kc, this Court made it abundantly clear that ABC had not been heard, and should be heard, on certain public interest matters on which it had not yet been permitted to adduce evidence (108 U.S. App. D.C. 83, 88), that ABC should not be required to share a channel if the other networks were subsequently given full use of their clears in Docket 6741, and that the Commission (in the Clear Channel Proceeding, sua sponte, or otherwise) should seek to provide channel facilities to the ABC network on a basis which is fair and equitable in comparison with other networks (108 U.S. App. D.C. 83, 88).

Thus, when the Commission again got around to looking at Docket 6584 in the summer of 1961, after having announced its tentative conclusion not to accord the networks equal channel facilities in Docket 6741, it was quite evident that several unfinished matters were yet to be resolved. Until ABC had been accorded the hearing which this Court said it was entitled to, and until the results of that hearing were reviewed by this Court (see 108 U.S. App. D.C. 83, 88), the manner in which 770 kc was to be hereafter used in New York was still an open question. And ABC had every right to have that matter finally resolved, before being required to elect whether to settle for lesser rights on 770 kc.

The proceedings in Docket 6584, be it remembered, had been explicitly left open in 1958. The two applications there ordered or permitted to be filed (by KOB and WABC) had been duly submitted. Hubbard's New York application, not there provided for, was not filed until

February 1960, long after the "cut-off" date for inclusion in a proceeding begun in 1944.

With substantial matters still unresolved, with a right of appeal provided by statute and by the 1960 decision of this Court, the Commission quite properly concluded that the future use to be made of 770 kc should be decided first. WJR, The Goodwill Stations v. Federal Communications Commission, supra. After that matter was resolved, applications would be entertained for utilization of 770 kc in New York — in conformity with the result there reached. By filing prematurely for directionalized operation on 770 kc in New York, before it was finally determined whether directional or nondirectional operation would be the future manner in which that channel should be used in New York, Hubbard was trying to beat the gun and to deprive ABC of its right to contest the 1958 result, under penalty of not being thereafter permitted a chance to salvage something in the event the questionable 1958 result was not in fact "varied."

As the Commission subsequently recognized in the resultant decision of July 8, 1963, in the circumstances which there existed, ABC should not be deprived of its New York outlet "without an opportunity for a hearing on the comparative merit of any application filed by it for directionalized operation, divorced from the 307(b) consideration of the instant proceeding." Any other action would have been unconscionable. Cf. Fort Harrison Telecasting Corp. v. Federal Communications Commission, 25 RR 2109 (U.S. App. D.C. 1963).

## CONCLUSION

Since the matters of which Hubbard complains are not yet final, they are not reviewable under 47 U.S.C. Secs. 402(a) and (b). Hence, the appeal in Case No. 18,045 and the petition for review in Case No. 18,078 should be dismissed.

Respectfully submitted,

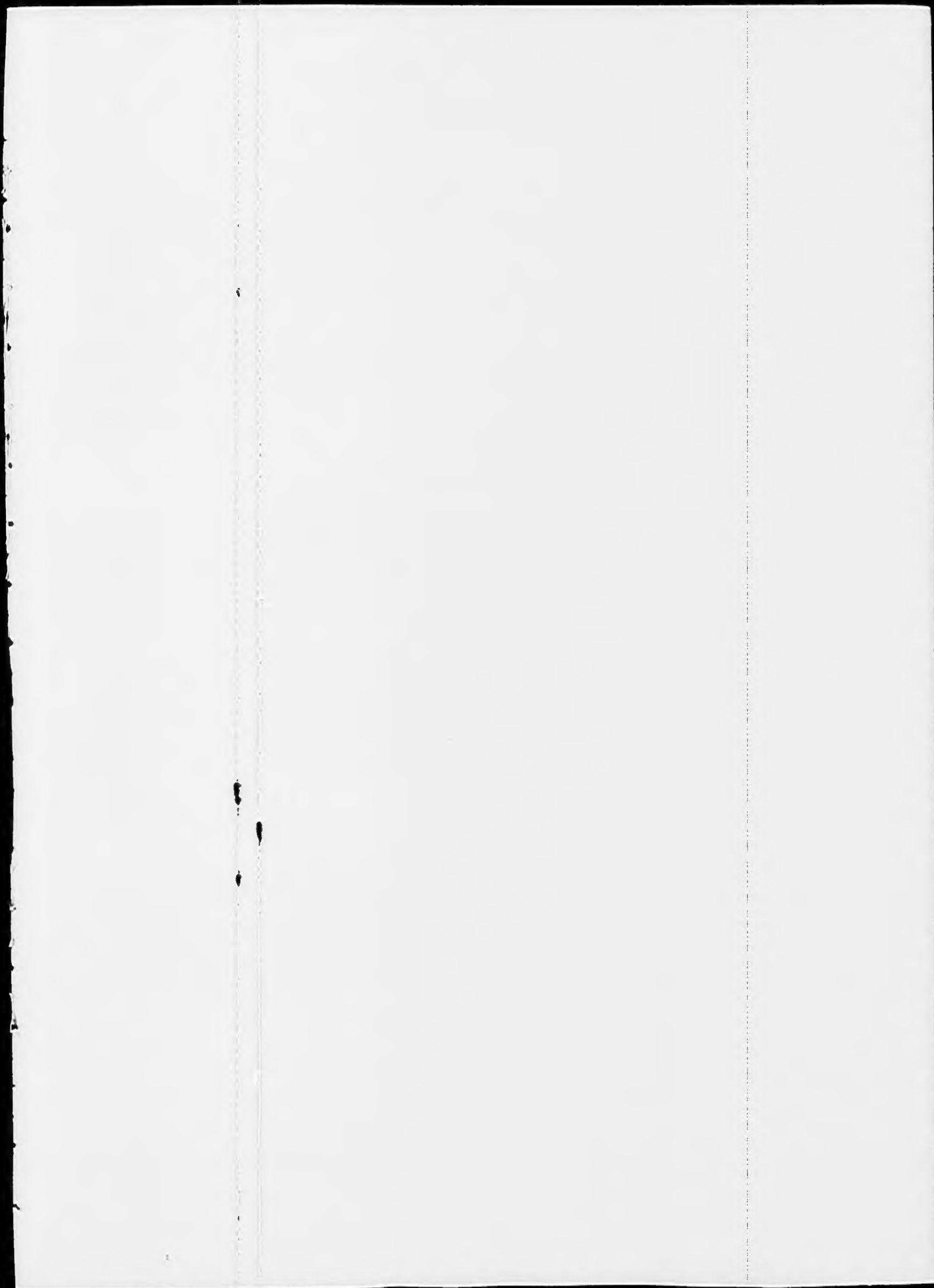
JAMES A. McKENNA, JR.

VERNON L. WILKINSON

McKenna & Wilkinson  
1735 DeSales Street, N.W.  
Washington, D. C. 20036

*Attorneys for Intervenor,  
American Broadcasting-  
Paramount Theaters, Inc.*

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### QUESTIONS PRESENTED

1. Where property is distributed by a corporation to its shareholders, as part of a plan of total liquidation, and where that distribution does not result in a taxable "dividend" to the shareholders, is the "basis" of that property, for purposes of computing the allowable "depreciation" deduction from such shareholder's gross income under the District of Columbia Income and Franchise Tax Act of 1947, as amended, to be determined by reference to any source other than Title XI, Section 6(b) of that Act?
2. If a distribution of property to shareholders in total liquidation of a corporation is held not to be such an "exchange" as would result in a nontaxable capital gain, does this holding mean that such distribution upon liquidation cannot be deemed an exchange for purposes of determining the proper "basis" for depreciation?
3. Where the applicable tax statute states that "basis" for depreciation "shall be" determined by reference to a specific section of the statute, and where such section, in its general terms, includes the property in question, will apparent "unreasonableness" in the application of the statute to such property justify a court in holding that depreciation "basis" will be determined by reference to rules other than those in that section?
4. Where a taxing statute deals separately with the concept of "basis" for determining gain or loss, and the concept of "basis" for determining the proper depreciation deduction, in two distinct sections, are these two bases to be treated as different and distinct except insofar as their language requires parallel construction and treatment?
5. When a taxing statute purports to be complete and inclusive of all tax matters, is it not strongly presumed that such statute is, in fact, complete and inclusive of the property involved in the case at bar?